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FILED
JAN 14 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 651

DUNCAN C. McCREA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. 651

DUNCAN C. McCREA,

vs. *Petitioner,*

THE PEOPLE OF THE STATE OF MICHIGAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully presents:

I.

Summary Statement of Matter Involved.

Duncan C. McCrea, the Petitioner, was prosecuting attorney of Wayne County, Michigan, from January 1, 1935 until September 13, 1940, when he was removed from office by order of the Governor of the State. In August 1939 the Circuit Judges of Wayne County granted a private citizen's petition for a grand jury investigation of alleged corruption of public officials and the taking of graft in

Wayne County, and designated Circuit Judge Homer Ferguson to act as a one-man grand jury (3 Comp. Laws Michigan, 1929, par. 17217 [Stat. Ann. par. 28.943]). As a result of the investigation made by the one-man grand jury, several informations were drawn naming Petitioner and others as defendants charging them with violation of various state statutes. Prosecution was actually instituted on an information (R. 28) charging the Petitioner and others with "a conspiracy to obstruct justice" and, after a trial extending over a three months' period, the Petitioner and other public officials were convicted on the second count of this information. The conspiracy allegedly consisted of an agreement to assist and enable the operation of various illegal enterprises in return for which the Petitioner and others allegedly received graft. Petitioner was sentenced to imprisonment for a period of four and one-half to five years, and to pay a fine of $2,000.00 (R. 1987-8).

Petitioner appealed to the Supreme Court of the State of Michigan which affirmed the judgment and sentence. It is this judgment which is now sought to be reviewed.

During the course of the trial, the Petitioner (1) was not permitted on cross examination to lay a foundation for impeachment of witnesses, including defendants who had been granted immunity, by asking them whether they had testified differently before the one-man grand jury; (2) was forced by the one-man grand jury to claim his State privilege against self-incrimination in refusing to testify as to certain incidents which would be developed at the trial, but was penalized for claiming the privilege when the government attorney was permitted to show to the petit jury that Petitioner had stood on his constitutional rights and refused to answer; (3) was seriously prejudiced by the government in that the prosecution failed to indorse the names of *res gestae* witnesses on the information at the time of filing, although the state statute made this manda-

tory; (4) was compelled to proceed with a jury which was illegally drawn from a list of jurors of registered voters but excluded electors who were not registered voters, but who had the qualifications of jurors, although the State statute in no way contemplated the exclusion of electors who were not registered voters; (5) was seriously prejudiced in that the jury, in its deliberation, was permitted to have in the jury room three volumes of the transcript of testimony without the knowledge of the Court or defense counsel and certain exhibits with the approval of the Court but without the knowledge or consent of defense counsel; (6) was named a defendant in four warrants (indictments) wherein the one-man grand jury was the complaining witness, prosecuted on the second of these warrants, brought before the same one-man grand jury sitting as a preliminary hearing magistrate, and probable cause found notwithstanding that the same one-man grand jury had prejudged the question of probable cause when he filed the warrant as complaining witness.

II.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 237 (b) of the Judicial Code as amended on the ground that Petitioner has been deprived of Due Process of Law and the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The judgment to be reviewed is the judgment of the Supreme Court of the State of Michigan, entered on November 24, 1942 (R. 2138a, 2068), affirming the judgment of the Circuit Court for the County of Wayne, State of Michigan, entered on the 14th day of May, 1941 (R. 1987-1988). Motion for rehearing was submitted December 16, 1942 (R. 2068) and denied December 22, 1942 (R. 2165). A stay of

execution conditioned on filing a petition for a writ of certiorari to this Court within thirty days was granted December 22, 1942 (R. 2069).

Petitioner (Point 1) objected to the limitation of cross examination (R. 242, 361-364, 479) as being a deprivation of Federal Due Process and error was assigned (R. 10) on this ground. The Supreme Court of Michigan considered the Federal Question (R. 2093) and overruled it.

Petitioner (Point 2) objected to the disclosure before the petit jury that he, after informations were drawn, was subpoenaed before the grand jury and there relied on the state constitutional guaranty against self-incrimination (R. 1697); asserted that requiring him to answer denied him Federal Due Process (R. 1698); asked for a mistrial (R. 1702, 1738-1740); moved to strike (R. 1808); assigned error, all on the Federal ground (R. 3, 12-13). The Supreme Court of Michigan held that the conduct herein complained of was not a denial of State Due Process (R. 2131-38) but did not pass specifically on the Federal Question although Federal authorities were cited (R. 2136, 37).

Petitioner (Point 3) objected to the failure of the government attorney to indorse the names of known *res gestae* witnesses on the information at the time of filing in accordance with the established state procedure and moved to quash (R. 73, 93); error was assigned (R. 3); and the Supreme Court of the State of Michigan considered the question extensively (R. 2119-2127).

When (Point 4) the first fourteen prospective jurors had come into the jury box, Petitioner filed a written challenge to the array (R. 75, 78-81) attacking the validity of the panel because of the deliberate failure of the Wayne County Jury Commission to follow the provisions of the statute pertaining to the drawing of petit jurors for use in Wayne Circuit Court. This challenge specifically relied on the Due Process and Equal Protection clauses of the Fourteenth

Amendment to the Federal Constitution (R. 79). After trial, by supplemental motion for a new trial (R. 2029-2035) and amendment thereto (R. 2035-2041), Petitioner renewed his objection again on the Federal ground. The Supreme Court of the State of Michigan considered the Federal Question (R. 2128) and held that there was not a denial of due process (R. 2129).

After the retirement of the jury (Point 5) and during its deliberation, three volumes of testimony were handed to the jury without the knowledge and consent of either the Trial Court or defense counsel (R. 1900). Certain exhibits were given to the jury by the Court, but without the knowledge or consent of defense counsel (R. 1907). Petitioner moved for a mistrial (R. 1906). Error was assigned (R. 9). The Supreme Court of the State of Michigan considered the question (R. 2111-2119). The one-man grand jury had entered upon and completed an inquisition (Point 6) which resulted *inter alia* in the filing by him of four warrants (or "Indictments" under the state statute [25 Mich. Stat. Ann., Sec. 28.844]), naming Petitioner as the defendant. Petitioner was actually prosecuted on the second of these warrants. Under the state practice, following the filing of the warrant, Petitioner was entitled to a preliminary examination to determine probable cause. The preliminary examination was conducted by the same one-man grand jury (Hon. Homer Ferguson), who was the complaining witness on the warrant. Some time prior thereto the same one-man grand jury had instituted ouster proceedings against Petitioner herein and filed a sworn complaint against him in connection therewith with the Governor of the State of Michigan. Accordingly, when Petitioner came before the same one-man grand jury on the preliminary examination he protested vigorously, filing a written motion asserting that the investigator was not qualified to sit in judgment on the issue of probable cause. The

one-man grand jury refused to entertain such motion, supported by affidavit, and ordered it expunged from the record; consequently, it does not appear in the record below. However, two days before the commencement of trial, Petitioner renewed his objection before the Trial Court (R. 71). Petitioner asserted that the investigator, having prejudged the question of probable cause, improperly constituted himself the preliminary hearing magistrate and that Petitioner was being held for trial in a manner unknown to the law of the state and contrary to the criminal procedure and practice of the state followed in all other cases, and that, therefore, there was a denial of due process and equal protection of law in contravention of the Fourteenth Amendment to the United States Constitution (R. 70, 71). Petitioner further averred that, if the state statute permitted such a procedure, it impinged on a Federal Right in that it denied due process of law under the Fourteenth Amendment to the United States Constitution (R. 70, 71). The motion was overruled (R. 77); error was assigned (R. 2); the Court Below considered the Federal Question (R. 2097-2100), and dismissed the contention on the theory that Federal due process does not require a preliminary examination (R. 2099).

If the errors complained of herein are substantial, a violation of Federal Due Process exists.

Lisenba v. *California*, 314 U. S. 219.
Moore v. *Dempsey*, 261 U. S. 86.
Powell v. *Alabama*, 287 U. S. 45, 68.
Baldwin v. *Hale*, 1 Wall. 223, 233.
Cf. *Twining* v. *New Jersey*, 211 U. S. 78, 110.
Betts v. *Brady*, No. 837, Oct. Term, 1941, 86 Law. Ed. 1116, 1120.

It is respectfully submitted that petitioner has affirmatively shown that this Court has jurisdiction. See *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649.

III.

Questions Presented.

1. Is it not a violation of the concept of liberty embodied in the due process clause of the Fourteenth Amendment, as affecting the adequacy of a defendant's opportunity to be heard, to cut off the right of cross examination by preventing defendant from laying a foundation for impeachment of a witness by asking him whether he testified differently when appearing before the grand jury, particularly when the witness is a co-defendant who has turned state's evidence, been cloaked with immunity, and whose testimony goes to the heart of the case?

2. Where three indictments have been returned against a defendant and the defendant is brought *under process* before a one-man grand jury, and with respect to the subject matter of the pending informations certain questions are asked by the one-man grand jury, and the one-man grand jury orders the defendant either to answer the questions, claim his immunity under a state constitutional guaranty or be given a ninety-day jail sentence for criminal contempt, and the defendant claims his privilege, is it not a violation of the guaranty of a fair and impartial trial embodied in the due process clause of the Fourteenth Amendment for the state's attorney, on the theory of testing the defendant's credibility, to disclose before the petit jury that the defendant claimed his privilege when before the grand jury?

3. Is it not a violation of the concept of *notice* embodied in the constitutional guaranty of a fair and impartial trial protected in the due process clause of the Fourteenth Amendment for the government attorney to fail deliberately to indorse *res gestae* witnesses on the information at the time of filing, in violation of a State Statute and thereby substantially prejudice and handicap the defendant at the

trial, particularly where on the *voir dire* the names of witnesses endorsed on the information are read to the panel in order to determine whether any member of the panel has had contact with any witness and, after jury chosen and sworn, this right was destroyed as to witnesses whose names were endorsed during the trial by fiat of the Court? Can this be said to guarantee a fair and impartial jury trial?

4. Is it not a violation of the fundamental right to a fair and impartial trial, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment, where a state gives a jury trial as a matter of right, to exclude from the jury panel qualified electors who are not registered voters, notwithstanding the provisions of state law providing for the selection of the panel from all qualified electors? Can this be said to be a trial by a jury of the vicinage or by a legal jury at all?

5. Where the jury has retired to deliberate, is it not a denial of a Federal right under the due process clause of the Fourteenth Amendment guaranteeing *liberty* to the citizen for (a) the Trial Court, without authority of law or knowledge and consent of defense counsel, to submit arbitrarily exhibits to the jury; (b) the jury to be given by an officer of the *petit* jury, who received them from an officer of the *grand* jury, three volumes of the transcript of trial testimony, without the knowledge or consent of either the Trial Court or defense counsel?

6. Is it not a denial of a Federal Right for a state to grant a citizen the right to a preliminary examination and yet in that same jurisdiction have a so-called one-man grand jury, as complaining witness, return a warrant (indictment) naming a citizen as defendant and then permit, under the color of a state statute, that same one-man grand jury to sit in judgment on the issue of probable cause at the preliminary hearing? As a collateral question, are not the acts

of a state judge sitting as a so-called one-man grand jury, in denial of a Federal Right when that state official sets himself up as an inquisitor, and without regard to state constitutional or statutory law, proceeds to carry on an inquisition, bringing citizens before him under illegal process, without process, and by acts clearly constituting assault and battery, false arrest, false imprisonment and other conduct too numerous to herein enumerate?

It is submitted that alone, and particularly in the aggregate, these errors show that no fair trial within the Federal constitutional guarantee has been had.

IV.

Reasons for the Allowance of the Writ.

The irregularities in the trial of Petitioner clearly denied him a fair and impartial trial. No reported case has been found wherein a state judge was constituted an inquisitorial tribunal, denominated a one-man grand jury, who thereupon collected evidence without regard to law and order. The same state judge returned an indictment and then took it upon himself to sit as the magistrate at the preliminary hearing and determine the issue of probable cause on the evidence he had gathered, after he had sworn to the warrant and instituted ouster proceedings against Petitioner.

The record clearly demonstrates that qualified electors were excluded from the jury panel by the Secretary to the Jury Commission acting without authority in law or fact. The method of selecting jurors had the effect of discriminating against Petitioner because of political affiliation. Wholesale violations of the statutes controlling the selection of jurors resulted in the denial of due process and equal protection of the law as guaranteed by the Federal Constitution.

During the trial Petitioner, on cross-examination, was confronted on several occasions with the fact that he stood on his state constitutional guarantee against self-incrimination when *subpoenaed* before the one-man grand jury after the indictment was drawn upon which the prosecution below was based. The Petitioner was *forced* into claiming the privilege and thus *trapped* when the disclosure was made to the petit jury. This would appear to violate the common understanding of all men of the concept of a fair trial. No case in Anglo-American jurisprudence has been found wherein any government resorted to such a practice. It is respectfully submitted that this Court should determine the constitutional efficacy of this practice in the light of the due process clause of the Fourteenth Amendment to the United States Constitution.

We also believe, as shown in the accompanying brief, that the substantial limitation of the right of cross-examination denied the Petitioner due process of law. We respectfully submit that there was a denial of a fundamental right when the Petitioner was not permitted to lay a foundation for impeachment of witnesses by bringing out what their testimony before the one-man grand jury had been. The right to so cross-examine is vital to the defense when the witnesses are co-conspirators who have been granted immunity and turned state's evidence. This was peculiarly true under the facts set out in our brief. This Court has held that it is of the essence of a fair trial that the defense be given the opportunity to develop facts tending to discredit the testimony in chief. The question is a substantial one and it is most desirable that this Court determine whether a state may so cut off the right of cross-examination without impinging on the due process clause of the Federal Constitution. The question goes to the *adequacy of the opportunity to be heard and to defend.*

Where a state has an established procedure which requires the endorsement on the information at the time of filing of the names of *res gestae* witnesses, Petitioner was denied due process in that he was not only disadvantageously surprised but deprived of the opportunity to determine the impartiality of the jury in relation to some twenty witnesses whose names were summarily ordered to be endorsed on the information during the trial by the Trial Court. It is felt that this conduct deprived Petitioner of *notice* and went to the *adequacy of his opportunity to defend* in the light of the decisions of this Court propounding the meaning of the due process clause of the Fourteenth Amendment.

The Petitioner was given no trial at all in the constitutional sense, in that the jury received three volumes of the transcript of the testimony and certain exhibits. It is respectfully submitted that this Court should ultimately decide that Petitioner was denied a Federal Right in that the conduct of the jury, and the court officials, denied him due process of law under the Fourteenth Amendment.

Petitioner feels that he was denied his day in court under the established precedents of this Court, particularly in view of the cumulative effect of the irregularities underlying the questions herein presented in their relation to the fair and impartial trial guaranteed as a matter of Federal Right in the Fourteenth Amendment.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Michigan, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of proceedings herein; and

that the Judgment of the Supreme Court of the State of Michigan be reversed by this Honorable Court, and your Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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BRIEF IN SUPPORT OF PETITION.

I. Opinion Below.

The opinion of the Supreme Court of the State of Michigan, filed November 24, 1942, in the court below, has not yet been officially reported but is found in the record at page 2073.

The Trial Court did not write an opinion.

II. Basis of Jurisdiction.

This has already been discussed under the same heading in the Petition.

III. Further Statement of the Case.

Petitioner seeks a review of the judgment of the Supreme Court of the State of Michigan, filed November 24, 1942, (R. 2138a, 2068), affirming his conviction and sentence entered in the Circuit Court for the County of Wayne, State of Michigan, on the 14th day of May, 1941 (R. 187-88), after a trial before the Honorable Earl C. Pugsley and a jury.

The Petitioner was found guilty under the second count of an information (R. 28-43) charging a conspiracy to obstruct justice. Before the case went to the jury, the prosecutor elected to dismiss Count I (R. 1854). Count II charged Petitioner, then prosecuting attorney of Wayne County, and certain other public officials and persons with "the common-law offense of a conspiracy to obstruct justice" (R. 2075). The agreement allegedly consisted of a scheme to protect illegal enterprises for graft (R. 34-41).

Petitioner was sentenced to from four and one-half to

five years imprisonment, and to pay a fine of $2,000.00 (R. 1987-8).

The indictment, also known as a warrant under the State practice, was returned by a so-called one-man grand jury (Honorable Homer Ferguson). An inquisition was conducted wherein witnesses were interviewed in a star-chamber room in a local office building, (R. 478-9); subpoenas were served without regard to law (R. 341-7) and on many occasions witnesses were apprehended without subpoena (R. 1745); witnesses were held incommunicado for days (R. 1123, 4-30); third-degree methods were used (R. 478-9); other atrocities occurred (R. 1219-20). After thus securing "evidence," the indictment was returned. The same one-man grand jury constituted himself as the preliminary hearing magistrate to resolve the issue of probable cause; a written objection was made but ordered expunged by the grand jury; motion to quash the information was made on this ground (R. 69) and denied.

During the course of the trial, petitioner sought to lay a foundation for the impeachment of co-defendants and other witnesses by asking them whether they testified differently when appearing before the grand jury. In each instance the Trial Court denied Petitioner the right to cross-examine as to discrepancies between testimony during the trial and that given before the one-man grand jury (R. 242, 361-364; 479; 338, 349, 482, 855, 973, 1330). Upon the ground that "You can't go into the grand jury room here" (R. 242) the Trial Court repeatedly adopted the prosecutor's theory that

> "He has no right to ask any questions about what happened in the grand jury unless I bring it out, and that is the law" (R. 361-364).

Petitioner took the stand in his own defense. On cross-examination the prosecutor asked Petitioner if he had

claimed the privilege against self-incrimination when subpoenaed before the one-man grand jury (R. 1697-1700; 1704-1730), conceding that the purpose of the interrogation was not to impeach but rather to create an inference of guilt (R. 1699, 1700). The prosecutor simultaneously developed that *other* indictments were pending against petitioner (R. 1702). A mistrial was prayed (R. 1702) and denied (R. 1703). Petitioner objected (R. 1601, 1697-1700; 1738-40) claiming a denial of due process.

At the outset of the trial Petitioner made a written challenge to the array of jurors, attacking the validity of the panel because of the failure of the Jury Commission to follow the statute pertaining to the drawing of petit jurors and arbitrarily excluding many citizens from the panel, (R. 75, 78-81). After trial, additional challenges were made (R. 2019, 2029-35; 2035-41). Grounds averred were that

a) the Jury Commission did not make up the jury list but delegated this power to its secretary (R. 2029);

b) instead of each Commissioner making up a list of qualified electors in his district as required by the statute, the Commission permitted its secretary to make up a list from a list of *registered voters* under a so-called key number system (R. 2030);

c) the Jury Commission used an ancient poll list rather than a current one, e.g. used a 1933 list of *registered voters* showing but 400 names in Brownstown Township whereas in 1940 there were 2900 registered voters, and in Hamtramck, out of about 25,000 registered voters in 1940, only one juror was selected, and one juror had been examined for jury duty on November 23, 1934 (R. 2040);

d) the records of the Jury Commission and of the Wayne County Clerk showed that on one jury list "A" for the month of January, 1941, there were 115 jurors' names yet

38 of these names were not included in the list certified by the Commission (R. 2039-41);

e) that from communities where large Republican majorities predominated in elections the secretary of the Commission selected many jurors, while from communities where the election showed heavy Democratic majorities he selected few if any jurors (R. 2042-7);

f) although Belleville contained 400 registered voters, the secretary selected 16 jurors; from Plymouth with 2700 registered voters he selected 14 jurors, from Wyandotte with 12,000 registered voters he selected 11, from Dearborn with 27,000 registered voters he selected 6, and from Ecorse with 7,000 registered voters 5 jurors were selected (R. 2044-47);

g) the secretary used a so-called key number system without any authorization by the Commission, notwithstanding that he had testified falsely under oath in another proceeding against this Petitioner that he had been authorized by the Commission to use such system (R. 2048).

The Trial Court refused to consider the challenge before trial and summarily overruled Petitioner's contention (R. 78) and did likewise when the challenge was renewed on motions for a new trial (R. 2041, 2047, 2050).

At the time of the filing of the information the prosecutor failed to indorse the names of certain res gestae witnesses on the information, although so required by mandatory statute (R. 28, 41-3). In the course of the trial objection was made to the failure on the ground that the prosecution knew that these witnesses were essential to the presenting to the jury of a full picture of the alleged overt acts of the conspiracy (R. 93-6). The trial court summarily ordered the endorsement of the names of some twenty res gestae witnesses (R. 415), notwithstanding that petitioner was

then in no position to determine the impartiality of the petit jury in relation to these twenty witnesses. Under the State practice the prospective panel is interrogated on the matter of contact or relationship between the jurors and witnesses on the voir dire. This could not be done as to these twenty witnesses.

After the retirement of the jury, and deliberation begun, the Court, without the knowledge or consent of defense counsel, sent in various Exhibits to the jury (R. 1906). Three volumes of testimony were also given to the jury, without the knowledge or consent of Court or counsel (R. 1900). Petitioner moved for a mistrial (R. 1906); denied (R. 1934).

IV. Specification of Errors.

A specification of the errors intended to be urged has been given in the accompanying Petition under the Heading "Questions Presented" and in the interest of brevity will not be repeated, but is referred to and incorporated herein as though set out at length.

V. ARGUMENT.

(1) The substantial restriction of the right of cross-examination (Question 1).

The opinion of the Supreme Court of the State of Michigan states that with respect to the denial of Petitioner's efforts to lay a foundation for impeachment of witnesses by bringing out what their testimony before the grand jury had been, that the Petitioner

> "could have examined or cross examined witnesses without referring to their grand jury testimony. If he was not satisfied with their testimony, he could have called either Judge Ferguson or the stenographer who took the grand jury testimony to testify as to whether

> the witnesses' testimony before the grand jury was 'different from' the evidence given by such witnesses at the trial" (R. 2096).

That this is no answer is made only too clear by the ruling of the Trial Court holding that Petitioner "could not go into the grand jury here" (R. 242) and that the Petitioner had "no right to ask any question about what happened in the grand jury" unless first developed by the government (R. 361-364, 479). In each instance the Trial Court sustained the prosecutor's objections "to any question with reference to the grand jury testimony" (R. 362). Thus there was real merit to Petitioner's contention that it would have been futile to call Judge Ferguson (the one-man grand jury), notwithstanding what the Court Below says (R. 2097). Assuming that Judge Ferguson could have been called, the right to cross examine should not have been so delimited.

We are at a loss to understand a theory that permits the prosecution to lay a foundation for impeachment but denies the same opportunity to the defendant. We know of no policy, State or Federal, sanctioning one rule of evidence in favor of the State and following the opposite of the rule against the defendant. No traditional rule of secrecy of grand jury proceedings is in any way involved. The viciousness of so restricting the Petitioner goes to the right of cross examination which this Court has held to be a fundamental right and of the essence of due process of law.

In *Alford* v. *United States*, 282 U. S. 687, it is stated that

> "The cross examination of a witness is a matter of right." The Ottawa, 3 Wall. 268, 271.
>
> "Its permissible purposes, among others, are • • • that facts may be brought out tending to discredit witness by showing that his testimony in chief was untrue or biased. *Tla-Koo-Yel-Lee v. United States*, 167 U. S. 274; *King v. United States*, 112 Fed. (2d)

988; *Farkas v. United States,* 2 Fed. (2d) 644; see *Furlong v. United States,* 10 Fed. (2d) 492, 492." 282 U. S. 692.

The vital importance of permitting such cross-examination lies in the realization that counsel

> "cannot know in advance what pertinent facts may be elicited on cross examination. For that reason it is necessarily exploratory; * * * it is the essence of a fair trial that reasonable latitude be given the cross examiner, even though he is unable to state to the court what facts a reasonable cross examination might develop * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. *Nailor v. Williams,* 8 Wall. 107, 109."

In the present case, some of the witnesses to whom questions were propounded with respect to their grand jury testimony were co-defendants who had turned state's evidence. The essential need for permitting the defense to test their credibility, in the light of what they might have previously testified to before the grand jury prior to immunity granted, is epitomized in the language of Chief Justice Stone in *Alford* v. *United States,* 282 U. S. 687, wherein he states that the defendant should be permitted to show by such facts as proper cross-examination might develop that the testimony of the witness was biased because "given under promise or expectation of immunity or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution."

Clearly the Trial Court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a

reasonable cross-examination (282 U. S. 694.) Cf. *Gaines* v. *United States*, 277 U. S. 81, 85; *Dowell* v. *United States*, 221 U. S. 325.

In the setting of the trial below a substantial right was denied. Wigmore has said "if we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improve methods of trial-procedure." *V Wigmore on Evidence*, (3 ed.) Sec. 1367, page 29.

The ruling of the Court Below is contrary to every known authority: *Regina* v. *Gibson*, 1 Car. & M. (41 Eng. Com. L. 364); *State* v. *Silverman*, 100 N. J. L. 249, 252, 253; *Commonwealth* v. *Mead*, 12 Gray (Mass.) 167; *Burdick* v. *Hunt*, 43 Ind. 381-9.

This Court has stated that while due process is essentially a matter of state law, that nonetheless there must be an adequate opportunity to be heard and to defend. See *Snyder* v. *Mass.*, 291 U. S. 97. A substantial Federal Question is presented when the right of cross-examination has been so restricted as to affect the adequacy of the opportunity to be heard and to defend. What could be more important to the defense of Petitioner in a conspiracy case than the opportunity to lay a foundation for the impeachment of his alleged co-conspirators, some of whom had turned state's evidence, and left him in the position of pitting his word against theirs?

(2) The disclosure before the petit jury of petitioner's claim of immunity before the grand jury (Question 2).

The Constitution of the State of Michigan provides

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." (Mich. Constitution, 1908, Art. 2, par. 16)

The Supreme Court of Michigan states that

> "A witness *subpoenaed* to testify in a criminal trial can stand upon his constitutional right and refuse to answer any questions which might tend to incriminate him. However, a defendant who voluntarily takes the stand in his own defense thereby waives such right and can be subjected to cross-examination concerning the facts of the case and as affecting his credibility." (R. 2134.) (Italics ours.)

The Court Below recognized the relation of the compulsion of the *subpoena* to the constitutional guarantee. The Petitioner was subpoenaed before the one-man grand jury after three warrants had been drawn by the same one-man grand jury naming him as a defendant. The following colloquy took place between the one-man grand jury and the Petitioner:

> "Q. Did you ever discuss policy with Colburn, policy and mutuel games?
> A. Not that I know of, but I still claim that I have a constitutional right not to answer.
> Q. Do you stand on your constitutional rights?
> A. Yes, I do.
> Q. In connection with that question?
> A. Yes.
> Q. Why?
> A. I am charged as a defendant in that case.
> Q. (By the Court): That is not a reason, if that is your only reason you will have to answer.
> A. I will say on the ground it might tend to incriminate me" (R. 171).

The Petitioner took the stand in his own defense in the trial below (R. 1636). On cross-examination, the prosecutor inquired of Petitioner as to whether he had been called before the grand jury. Petitioner replied that he had after the information had been returned (R. 1697), whereupon Petitioner asked that the jury be excused. Objection was

made to any demonstration by the prosecutor before the jury that Petitioner had stood on his "constitutional rights" before the grand jury (R. 1697), "constitutional rights, not only of the State, but of the United States Constitution" (R. 1698) to demonstrate "to this jury * * * that there must be an inference of guilt because he stood upon his constitutional rights at the time he was defendant in this case" (R. 1698). The prosecutor asserted that the petitioner should have chosen to be held in contempt and that "a lawyer and a prosecutor of long standing" had no right to stand on his rights and "then claim he can't be confronted with that in this court room" (R. 1699). The trial court stated that "if he had committed no wrong, there would be nothing in connection therewith which would incriminate him" (R. 1811-12).

On innumerable occasions the prosecutor, over objection, disclosed to the petit jury that Petitioner had claimed his immunity (R. 1697, 1711, 1715-1717, 1728-1730).

We submit that it is hardly compatible with the fundamental notion of a fair and impartial trial to make such a disclosure before the trial jury when

> (a) three indictments had already been returned against the Petitioner by the one-man grand jury without his having been called before the grand jury; (b) the indictment on which the present prosecution was had had already been served on the Petitioner when he was called before the grand jury; (c) *subpoenaed* before the grand jury and interrogated with respect to the defense he might have to the charges in the indictment; (d) the one-man grand jury, after Petitioner had indicated that he did not wish to disclose his defense in view of the fact that he was going to trial, gave Petitioner the choice of answering, being held in contempt, or claiming the state privilege.

The prosecutor and one-man grand jury must have known that inasmuch as this Petitioner had been named in three indictments he would not desire to disclose his defense to the same one-man grand jury which indicted him. The Petitioner informed the grand jury when summoned before it that he had already been named as a defendant in the present prosecution and two other cases, and for that reason did not desire to testify (R. 1710, 1730). The conclusion is inescapable that the only purpose of the prosecutor and one-man grand jury when calling this Petitioner before the grand jury under these circumstances was to prejudice him in the trial of this case. Obviously, the prosecutor did not expect the Petitioner to disclose his defense. Obviously, the prosecutor knew that this Petitioner could not convince the one-man grand jury that the warrant should be recalled. Obviously, the prosecutor knew that the Petitioner did not care to and would not testify before the same one-man grand jury under the circumstances.

This is not *Twining* v. *New Jersey,* 211 U. S. 77. The law of the State of New Jersey denied the privilege against self-incrimination. This Court held that this was not a denial of a Federal right. Our claim is not addressed to that proposition. The State of Michigan *guarantees* the privilege and by constitutional limitation restricts governmental power. Our claim is that having affirmatively granted the privilege the respondent has denied the Petitioner a fair and impartial trial in that Petitioner was led to rely on the privilege only to have it used against him before the petit jury. This was not a case where the government sought to impeach or contradict by the use of grand jury testimony, but was rather an outright parading carte blanche before the petit jury that Petitioner had stood on his state right, and it becomes all the more serious under the setting. Wigmore has championed the abolition of the privilege but not even he thinks the cross-examination

ought to go to "facts merely affecting credibility", *Evidence*, Sec. 2276, p. 445 (3rd Ed.) and in his voluminous treatise not a case in our jurisprudence is cited wherein a plain, bold disclosure was made to create the inference of guilt.

This is not *Raffel* v. *United States*, 271 U. S. 494. The question there involved the right in a Federal Court to show that the defendant had not taken the stand at a former trial of the same case. A waiver had occurred. Cf. *Arndstein* v. *McCarthy*, 254 U. S. 71). The line of cross-examination was found to be *proper*. The present case presents the anomalous situation of the one-man grand jury, who had thrice indicted the defendant, *bringing a defendant under process* before it, *forcing*, in law and in fact, the defendant to stand on his constitutional guarantee, knowing full well that the defendant must take the stand in his own defense at the trial. Cf. *United States* v. *Johnson*, 129 F. (2d) 954, 965, 966. To justify the interrogation on the theory that the Petitioner voluntarily took the stand and thereby waived his state or federal right under the facts of this case is to shun reality. It is entirely conceivable that the prosecutor might in every single case on the docket, after indictment returned, call a defendant before the grand jury, knowing full well that he will not disclose his defense, and then confront the defendant with his claim of immunity at the trial. The prosecutor, Trial Court and Court Below seem to feel that unless a named defendant is guilty he will have no hesitancy in making a full disclosure of his defense. The effect of such a preposterous system is to give the government not only a dress rehearsal but the opportunity to trap the defendant beyond the possibility of his being able to redeem himself. *8 Wigmore*, Sec. 2251 at 309. The inference created by such a practice is so strong as to go to the marrow of the concept of a fair trial. Cf. *United States* v. *Monia*, No. 248, Oct. Term,

1942. The conduct of the prosecutor and one-man grand jury made this no less "a trap for the witness"; *Wood* v. *U. S.*, No. 7863, District of Columbia Court ofAppeals, LXX Washington Law Reporter 690, 693; *Kercheval* v. *U. S.*, 274 U. S. 220.

We have been unable to find any case precisely in point. The likelihood of such a practice arising or existing in the Federal system is most remote; however, its use and sanction in the State of Michigan may lead to its adoption abroad, and we respectfully submit that this Court should determine its consistency or inconsistency with the Federal Constitution at this time.

(3) The failure to indorse the names of certain res gestae witnesses on the information (Question 3).

The settled law of the State of Michigan required that the prosecutor at the time of the filing of the information indorse thereon the names of all *res gestae* witnesses. The provision of the State Criminal Code thereto relating had been construed to be mandatory in many cases by the State Supreme Court. In the Trial Court the prosecutor was charged with deliberately failing to indorse on the information the names of certain witnesses, notwithstanding that the prosecutor was well aware that these witnesses would be used. An examination of the record would indicate that several of these witnesses were most important in the government's case in chief. The Petitioner charged below that the failure to indorse was deliberate and intentional (R. 233), particularly in the light of the fact that the prosecutor explained his failure as being due to "forgetfulness" although he did remember to indorse the names of various minor police officials.

The Court Below approved the action of the Trial Court in summarily ordering the indorsement of the names of *res gestae* witnesses during the trial (R. 2119-2127). Re-

liance is had on a provision of state law which permits the prosecution to indorse the names of *other* witnesses during trial (R. 2127), and on the catch-all state statute which provides that no judgment shall be set aside unless it affirmatively believes that the error complained of resulted in a miscarriage of justice (R. 2127).

This Court has said that in addition to an adequate opportunity to be heard and to defend, a defendant is as a matter of Federal due process entitled to *notice*. We respectfully submit that the fundamental right as envisioned in the idea of *notice* connotes that the defendant shall receive more than information to the effect that he has been charged with an offense and that a hearing will be had thereon at a given date. Under the established procedure of the State of Michigan the Petitioner quite properly relied on the statute and the decisions of the Court making it mandatory for the government to indorse the names of *res gestae* witnesses on the information.

It is the established practice in Michigan for counsel on the *voir dire* to interrogate the panel as to whether any member thereof had had contact with any witness whose name is indorsed on the information. It is error under the State law to call a witness whose name is not endorsed. Yet, the trial court in the instant case summarily ordered the endorsement, during the trial, of over twenty names on the information. The jury had been chosen and was sworn. No right to interrogate the jury with respect to these witnesses was possible. In our Federal Courts it is quite true that the defendant gets no such right or privilege (capital cases excepted), but the fact is that in the instant case the Petitioner was led to rely on the statute and the established procedure, and consequently was surprised when at the trial *res gestae* witnesses, whose names did not appear on the information, were called and used by the government. This too goes to the question of a fair and impartial trial

and taken together with numerous other acts on the part of the government, some of which are herein complained of, denied the Petitioner due process of law. Michigan itself has said that "The failure to indorse and produce these witnesses is not a mere irregularity. It is a positive invasion of a substantial right of defendant under the law." *People* v. *Hill*, 258 Mich. 79, 82, 83.

(4) The exclusion from the petit jury panel of qualified electors (Question 4).

Petitioner challenged the array of prospective jurors after fourteen persons had been called to the jury box for examination on *voir dire*, claiming that the list of jurors furnished by the Jury Commissioners was not taken "from all the qualified electors of Wayne County" (R. 75, 78-81). Specifically Petitioner claimed that electors were excluded who were not registered voters, although they had all of the other qualifications of jurors (R. 2128, *et seq.*). The Court Below summarily dismissed the contention stating in part that the Petitioner "makes no showing that the jurors selected from the list of registered voters were prejudiced against him or that the jury finally chosen failed to consider the question of his guilt or innocence in a fair and impartial manner" (R. 2129). In connection with his motion for a new trial Petitioner set up additional evidence challenging the jury panel. The Court Below dismissed this supplementary evidence on the grounds that Petitioner was a former prosecutor and therefore familiar with the procedure of the Jury Commission and, further, that he had not exercised reasonable diligence in discovering the irregularities (R. 2130).

The validity of the panel was challenged in that

(1) the Commission failed to follow the provisions of the statute pertaining to selecting the panel from

all qualified electors (R. 75, 78-81); (2) the Commission as such did not make up the jury list but delegated the power to its Secretary; (3) instead of each Commissioner making up a list of qualified persons as required by the statute, the Commission permitted its Secretary to make up a list from a list of registered voters under a so-called key number system (R. 2029-2041).

Petitioner alleged further that from communities where large Republican majorities predominated in elections, the Secretary of the Jury Commission selected many jurors, while from communities where the elections showed high Democratic majorities he selected few, if any, jurors, and that from Brownstown Township, which contained 2900 registered voters in December 1940, he selected the jurors from a 1933 list of registered voters containing only 400 names; that although on December 1, 1940 the City of Hamtramck had 24,557 registered voters, the Secretary selected only one lone, solitary juror; that although Belleville contained 400 registered voters, the Secretary selected 16 jurors; from Plymouth with 2700 registered voters he selected 14 jurors; from Wyandotte with 1200 registered voters he selected 11; from Dearborn with 2700 registered voters he selected six, and from Ecorse with 7000 registered voters 5 jurors were selected (R. 2029-2050; particularly 2042-2045).

While a state may take away trial by jury, where as a matter of state constitutional right trial by jury is granted a defendant, we respectfully submit that the trial by jury must comport with the fundamental notions of a fair and impartial trial. In such a case something less than a trial by jury is no trial at all. A trial by jury has a singular meaning in Anglo-American law. This Court has recently recognized the vital significance of illegally constituting the

jury. *Glasser v. United States*, 315 U. S., 60, 85-87. In its Report to the Chief Justice of the United States and members of the Judicial Conference of Senior Circuit Judges of the United States, the Committee on *Selection of Jurors* recommended, *inter alia*, that petit jurors be so drawn as to be truly representative of the community, the "sources from which they are selected should include *all* economic and social groups of the community"; that "political affiliation should be ignored." (Pages 14-30, February, 1942).

The Court Below placed great emphasis in its opinion on the failure to discover all of the irregularities prior to trial (R. 2130). The fact is that in the present case the challenge was made timely as to certain allegations (R. 75, 78-79). In any event, the government did not deny the allegations of the motions at the commencement of the trial or subsequent thereto, although the Court overruled all of the said motions (R. 78, 2041, 2047, 2050). The requirements to establish the allegations as set forth in *Glasser* v. *United States*, 315 U. S. 87, are herein present, for there were actual tenders of proof (R. 76, 2029-2035, 2035-2041), and affidavits were filed supporting the motions (R. 2033-2035, 2038-2041, 2049).

In many cases this Court has held that a person has been deprived of the equal protection of the laws in violation of the Fourteenth Amendment, because by the action of state officers in the selection of jurors, such person has been indicted by or tried before a jury not of his peers. Such was the holding where, by the action of state officers there had been a discrimination in the drawing of jurors because of political affiliations. *Kentucky* v. *Powers*, 201 U. S. 1 (reversed on other grounds); also *Kentucky* v. *Powers*, 139 Fed. 452.

Without burdening the Court on this phase of the argument, it is sufficient to say that the great weight of author-

ity in this Court, as is evidenced by the following citations, supports our position:

Neal v. *Delaware*, 103 U. S. 370
Smith v. *Mississippi*, 162 U. S. 592
Rogers v. *Alabama*, 192 U. S. 226
Strander v. *West Virginia*, 100 U. S. 303
Pierre v. *Louisiana*, 306 U. S. 354
52 *A. L. R.* 919-930
92 *A. L. R.* 1109-1124
Cf. *Glasser* v. *U. S.*, 315 U. S. 60, 85-87.

The common law controls in Michigan unless altered or repealed, 1 Mich. Comp. Laws 246; Const. Art. VII, Sched. Sec. 1. Trial by jury in a criminal case is guaranteed in the State Constitution, Art. II, Sec. 13, 1 Mich. Comp. Laws 198. The qualifications of an elector are set forth in Art. III, Sec. 1 of the Constitution, 1 Mich. Comp. Laws 201. Jurors shall have the qualifications of electors, 3 Comp. Laws 4921, Sec. 13841. The method of selecting jurors is governed by statute, 3 Comp. Laws, 4920-26, Secs. 13837-13862. A reading of these statutes clearly demonstrates that the Jury Commission is bound by the mandatory provisions of these statutes. It is elementary that statutes in derogation of the common law are to be strictly construed, yet the Jury Commission in the instant case completely ignored the statutes governing the selection of jurors. There was no trial by a jury of one's peers from the vicinage and discriminations were rampant.

(5) There was no trial at all in any fair sense of the term (Question 5).

Without the consent or knowledge of the Court and Petitioner three volumes of testimony were sent into the petit jury room. The volumes were obtained by an officer of the one-man grand jury who was in attendance at the trial (R. 1900). This officer transmitted the volumes to an offi-

cer of the petit jury, who in turn gave them to the jury. Sometime prior thereto the Court, at the jury's request, but without the knowledge or consent of the petitioner, sent in certain exhibits to the jury. Petitioner moved for a mistrial (R. 1906), which was overruled (R. 1934).

The Court Below considered the question (R. 2111-2119) and ruled that no prejudice resulted (R. 2117). Notwithstanding that these volumes contained, among other prejudicial testimony, the colloquy of the Trial Court and defense counsel, in the absence of the jury, regarding the social activities and jitterbugging of the jury while it was confined in a hotel (R. 218), which incident was passed over by the Court Below (R. 2111-2119).

We submit that the excusing of these serious errors cannot be justified on a theory that no prejudice was shown. Such reasoning not only begs the question, but ignores the constitutional precept involved. This Court has held that the deprivation of trial by jury does not contravene Federal due process. Here, however, the state guaranteed trial by jury and therefore the entire proceeding in the Trial Court had to comport with the traditional and historical requisites of a jury trial. To give Petitioner something less than a jury trial when the established procedure under which he was tried so required was to give him no trial at all. Michigan did not authorize the Court to send in the exhibits. Michigan did not sanction the sending into the jury by some Court attaches of the volumes of testimony. Under Anglo-American jurisprduence, unless there is a state law contrariwise, the jury as triers of fact is required to resolve exclusively the facts on the testimony adduced in open court. Even in the Fourteenth Century the jury could only carry out with them writings under seal. Thayer, *A Preliminary Treatise on Evidence at Common Law*, p. 107. To permit a jury to reorient and rehash testimony from the *unauthenticated* transcript is to cast asunder judicial

supervision, the oath, and the opportunity to be heard and to defend, all of which enter into the standards of a fair and impartial trial as guaranteed by the Federal Constitution. The position herein adopted has been consistently maintained since *Bushel's* case, Vaughan, 135; 6 How. St. Tr. 999. Michigan itself only recently recognized that such a flagrant departure from the concept of trial by jury casts "suspicion upon the otherwise orderly administration of justice". *People* v. *Chambers,* 279 Mich. 73, 80, 81. We respectfully submit that the Trial Court lost jurisdiction of the case below when the jury received these volumes of testimony and exhibits. See *Johnson* v. *Zerbst,* 304 U. S., 458, 468. The whole proceeding became a mere pretense of a trial. See *Brown* v. *Miss.*, 297, U. S. 278, 285, 286. The disorderly departures denied Petitioner a fair trial in the sense that they offend fundamental principles of justice within the meaning of *Powell* v. *Ala.,* 287 U. S. 45; see also *Mooney* v. *Holohan,* 294 U. S. 103, 112, 113.

> "It is clear that the reception of evidence after the jury has retired to consider a verdict reaches the extreme of irregularity." Wigmore on Evidence, Vol. VI, 3d ed., Sec. 1880.

(6) Preliminary examination conducted by judge who indicted as one-man grand jury (Question 6).

We have seen that the one-man grand jury conducted an unprecedented inquisition, and returned four indictments against this Petitioner. Prosecution was instituted on the second of these indictments, and the same one-man grand jury then sat as the magistrate at the preliminary hearing. Formal objection was made but the same one-man grand jury ordered it expunged from the record. Thereupon, the Petitioner filed a motion to quash the information several days before trial and the Trial Justice overruled it (R. 68, 69, 75). He asserted that it was a denial of State

and Federal due process for a one-man grand jury to sit as a judge at the preliminary hearing to determine the issue of probable cause when he had sworn to the complaint upon which the indictment was bottomed. There is no statute authorizing this procedure. The Court Below, however, by a process of inter-relating various statutes (R. 2099), concluded that a one-man grand jury had the power to investigate and sit in judgment on the facts he found. The underlying basis, however, of the opinion below on this point was that Petitioner had no Federal right to a preliminary examination (R. 2099). In the light of the established procedure and guaranteed state rights possessed by the Petitioner, this conclusion is hardly worthy of further treatment.

It is respectfully submitted that due process of law does not begin and end with the trial *qua* trial. The protection of the citizen against the acts of government begins prior to and extends beyond the inpaneling and discharging of a petit jury. It is only too obvious from a consideration of the constitutional limitations on the Federal Government contained in the Bill of Rights that many of our fundamental guarantees pertain to matters other than the conduct of the trial as such. The question with which we deal here relates to the denial of the Federal Right in that Michigan, after establishing a procedure to be followed in *holding* a defendant for trial, completely and summarily abandoned this procedure as to the Petitioner. Petitioner knows of no case wherein this Court has held that a state may bring a defendant to the bar of justice without following the forms of law where by specific statute a procedure is established. To adopt the unconstitutional procedure in the light of state law herein complained of was to deny Petitioner due process and equal protection of the law. No similar proceeding in the history of Michigan can be found. See 8 *Wigmore*, Sec. 2251; Cf. Sec. 2252, at 325 bb.

The combining of inquisitorial and judicial functions makes for a denial of due process and equal protection, particularly in the light of the conduct of the inquisitor in securing the evidence upon which probable cause was resolved. Witnesses were questioned at places other than the court room, in homes (R. 341); before police officers (R. 342); in the night; in zero weather were required to sleep with clothes on in bare rooms in a bank building; without food (R. 478-9) were held for five and six days; sleep was refused and other atrocities occurred (R. 1123-1130; 1219-1220). The collection of this "evidence" was supervised and the facts and evidence developed by the one-man grand jury. It was not the normal case where a warrant is issued upon the basis of a complaint based on testimony of witnesses. In this case we have a finding of probable cause upon testimony *produced* by the so-called grand jury. Petitioner was denied the right on preliminary examination to go before a judge who had no preconceived opinion or belief as to guilt or innocence or the existence or want of existence of probable cause. Moreover, the one-man grand jury had gone publicly on record as to his belief in the guilt of the Petitioner by instituting a proceeding before the Governor of the State of Michigan to remove Petitioner as prosecutor of Wayne County (R. 69, 70). He was the complaining witness in the ouster proceeding and was therefore interested in the outcome of the preliminary examination. The dangers inherent in permitting a judge to act as inquisitor, investigator and court are deplored in the case of *In re: Richardson,* 274 New York 401, 160 N. E. 655-8, by Justice Cardozo who stated that "Centuries of common-law tradition warn us with echoing impressiveness that this is not a judge's work. We shall be sorry to weaken that tradition by any judgment in this court."

While as the Court Below states, the record contains no affidavit (R. 299), it having been expunged by the one-man grand jury sitting as an examining magistrate, Petitioner did move to quash the information, claiming that the pretense of a preliminary examination was in contravention of the State and Federal Constitutions (R. 69-73). The Petitioner further asserted that even though the state law might permit the grand jury to sit as magistrate, this would be an impingement on Federal due process. It is felt that no citation of authority is required to rely upon the well-settled proposition that the irregular enforcement of an otherwise constitutional statute, or the acts of state officials, may be such as to deny Federal due process. The situation is quite different from the case where by state constitutional amendment criminal prosecutions are authorized to be filed without preliminary examination. Cf. *Woon* v. *Oregon,* 229 U. S. 586.

Conclusion.

For the reasons set out above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and thereafter reviewing and reversing the judgment below.

William E. Leahy,
Nicholas J. Chase,
Bowen Bldg.,
Counsel for Petitioner.

(31)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 771

BERTHA MALONE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

WILLIAM E. LEAHY,
NICHOLAS J. CHASE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully presents:

I.

Summary Statement of Matter Involved.

Bertha Malone, the Petitioner, was named as a conspirator in an information charging a conspiracy to obstruct justice filed December 12, 1940, in the Circuit Court of Wayne County, Michigan (R. 28). The information charged that petitioner and others allegedly operated houses of ill-fame and as such allegedly "by their agents or employees" paid certain public officials money, gifts and gratuities for the privilege of operating (R. 39, 40). After a trial extending over a three months' period, the Petitioner and other

private citizens and public officials were convicted on the second count of this information. Petitioner was sentenced to imprisonment for a period of 4½ to 5 years and to pay a fine of $2,000 (R. 1995).

Petitioner appealed to the Supreme Court of the State of Michigan which affirmed the judgment and sentence. It is this judgment which is now sought to be reviewed.

During the course of the trial, the State sought to paint a roseate picture by calling in as witnesses every available gambling house operator, prostitute and person of equal station. The State sought to establish that Petitioner owned a house of prostitution and that she had entered into an agreement with certain public officials, co-defendants, whereby she would be permitted to operate a house of ill-fame as long as she paid protection money. Assuming *arguendo* that Petitioner owned a hotel in which a house of prostitution was maintained, the proof at the trial failed to show any knowledge in Petitioner that protection money was being paid. The proof was undisputed that Petitioner lived in Florida for the greater part of the period of time involved, owned properties in Detroit and had other business interests there. The proof was further undisputed that one Hattie Miller was paid by Petitioner to maintain and operate the hotel, restaurant, bar, etc. The Government then sought to show that protection money had been paid by the said Hattie Miller to one Elik Gell, *a dead man.* Hattie Miller denied that she paid any money to anyone for protection. She denied paying any money to the *dead man* in his life time. Hattie Miller stated that she paid $900 to $1100 each month as expenses, the said monies being paid to Ida Herman and Charley Berman (R. 1112). In making her accounting to the Petitioner, Hattie Miller stated:

> "This $900 to $1100 was on the expense slip when I sent it to Bertha Johnson. I did not say to whom that money

> was paid each month. I just put it down as expense. Bertha Johnson never objected to me because I deducted from $900 to $1100 monthly as expenses'' (R. 1112).

On no less then four or five places in the Record the said Hattie Miller stated:

> "At no time did I ever have any conversation with Bertha Johnson that I had to pay for protection'' (R. 1147, 1119).

Under the Government's theory of the case there were two men who allegedly collected protection money for the prosecuting attorney and the sheriff, to wit, Sam Block and Gus Pines. Counsel have combed the Record and not a scintilla of testimony can be found wherein either of these men claimed that they received money from Hattie Miller or the Petitioner, notwithstanding that both men were granted immunity and testified for and in behalf of the State. Ida Herman and Charley Berman did not testify and Elik Gell was dead. On this state of the evidence it is difficult to understand how Petitioner could possibly be said to have conspired with certain public officials to obstruct justice. The fact of the matter is that not only was there no evidence of any participation in the alleged conspiracy by the Petitioner, but there was not even a reasonable inference thereof. From the state of the Record it would appear that it was the purpose of the prosecution to ruin the defendants who were public officials by showing that they were in league with certain asocial forces and, conversely, to convict Petitioner and others by showing that they engaged in illicit business and that therefore they must have paid protection money in order to do it. The voluminous Record in this conspiracy trial goes to show just what can be accomplished in a three months' trial wherein some twenty

defendants are named in an indictment, an indictment charging a "conspiracy to obstruct justice."

In sum, if it be admitted for the purpose of argument that Petitioner had retained Hattie Miller to operate the hotel and that she knew that Hattie Miller permitted prostitutes to carry on their profession therein, that is a long way from proving that Petitioner engaged in a conspiracy whereby she agreed with others to pay protection money in order that the prostitutes might be permitted to operate in her hotel.

The Court Below wrote an Opinion in this case, (R. 2211) the gist of which is that Petitioner is termed "a bawdy-house keeper" and then makes reference to opinions in companion cases (R. 2169-75; 89-90; 96).

During the course of the trial, certain fundamental errors were committed by the prosecution, which errors were assigned on appeal to the Court Below (R. 13-17). Some of these errors were also complained of by co-defendants, Duncan C. McCrea, Thomas C. Wilcox, Eddie Way, Ben Landsberg, Louis Elliott and Clyde Stambaugh. McCrea has filed in this Honorable Court a Petition for Writ of Certiorari, the same being No. 651, October Term, 1942, and the others have likewise petitioned this Court for a Writ, the same being Nos. 738-742, October Term, 1942.

The present Petitioner asserted specifically that: (1) There was a denial of a federal right in that the preliminary examination was conducted by a State Judge who had indicted the Petitioner while sitting as a one-man Grand Jury and prejudged the issue of probable cause (R. 14); (2) There was no trial at all since the petit jury, while deliberating, unlawfully was given certain volumes of the unauthenticated transcript of testimony, without authorization of the Court or consent of counsel (R. 16);

(3) There was a denial of a fair trial in that certain exhibits were submitted to the jury without the knowledge or consent of defense counsel (R. 17); and (4) The panel and array of petit jurors from which the jury was selected was illegally constituted in derogation of Petitioner's state and federal constitutional rights (R. 2013-2016, 2017).

There is also involved in the present Petition the independent question of whether or not the conviction of Petitioner as a conspirator in a conspiracy to obstruct justice without proof in the evidence of her connection with or knowledge of the alleged conspiracy is not a denial of liberty under the Fourteenth Amendment. Petitioner appreciates that this Court will ordinarily not review evidence and that the verdict of the jury ordinarily forecloses that question; however, it is respectfully submitted that where the allegation is made by a petitioner in this Court that a State has not proven petitioner guilty of the crime charged that this Court should intervene in order that justice may be served. We say this fully mindful of certiorari practice as it has developed and grown in the past twenty-five years.

II.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Sec. 237 (b) of the Judicial Code as amended on the ground that Petitioner has been deprived of Due Process of Law and the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The judgment to be reviewed is the judgment of the Supreme Court of the State of Michigan, entered on the 16th day of December, 1942 (R. 2211), affirming the judgment of the Circuit Court for the County of Wayne,

Michigan entered on the 14th day of May, 1941 (R. 1995). Motion for rehearing was submitted and denied (R. 2209). Two Stays of Execution were granted by the Court Below (R. 2209) and this Honorable Court granted a further Stay of Execution provided that the present Petition be filed by February 28, 1943.

III.

Questions Presented.

At the outset it is respectfully submitted that the present Petition involves a criminal case wherein the State failed to prove the crime charged. The State of Michigan through a so-called one-man grand jury endeavored to make out the crime of conspiracy to obstruct justice by corraling certain public officials with certain asocial personalities and thereby sought to infer that in return for protection money these public officials agreed that illicit business might flourish in Wayne County, Michigan. The present Petitioner, who was not even in Detroit during the period of time covered by the indictment, has been rather freely called a "bawdy house keeper" (R. 2210). At the trial the State was unable to show by any proof, direct or indirect, that Petitioner agreed to pay anyone any money in order that she might operate a house of prostitution. The Record may be culled and combed and the *legal* proof is just not there. No person in this democracy ought to be sent to prison unless he or she is guilty of a crime charged in an indictment and proved out at a trial. We respectfully submit that if a Writ issue in the present cause it can be convincingly demonstrated that the Petitioner has been denied the liberty guaranteed to her under the Fourteenth Amendment.

Petitioner respectfully directs the attention of this Court to the fact that Petitions for Writs of Certiorari have been

filed by six other co-defendants. Certain questions raised in those Petitions apply likewise to the present Petition. It is true that certain questions raised in the Petition of Duncan C. McCrea were not preserved in the Trial Court as to the present Petitioner or were not germane to her defense. This is true also as to certain of the questions raised in the Petition of Wilcox, et al., Nos. 738-742, October Term, 1942.

Insofar as the Petitions overlap, Petitioner does not propose to burden this Court with a reiteration of the questions presented.

As to the present Petitioner, the following points were preserved and raised in the Court Below: (1) The exclusion from the petit jury panel of qualified electors who were not registered voters and the general violation of the Statutes relating to the selection of a jury; (2) That the jury while deliberating was interfered with by a deputy sheriff and given certain testimony embodied in the unauthenticated transcript without the knowledge or consent of the Trial Judge or counsel; (3) That the proceedings by the one-man grand juror were illegal and unlawful, particularly in that the grand jury sat as the preliminary hearing magistrate.

IV.

Reasons for the Allowance of the Writ.

The public importance of the constitutional questions posed in the present Petition have been set forth in the Petition for Writ of Certiorari filed by Duncan C. McCrea, No. 651, October Term, 1942. The questions involved are discussed in the McCrea Petition aforesaid as well as in the Petition of Wilcox, et al., Nos. 738-742, October Term, 1942. To reiterate, several questions are presented in the McCrae Petition and in the Wilcox Petition, respectively, which do not appertain to the present Petition. However, insofar as

the Petitions overlap, the significance of the questions presented in the present Petition are fully discussed in the McCrae Petition. Because of the importance of the questions presented, it is felt that a review of the instant case would be also appropriate.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Michigan, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of proceedings herein; and that the Judgment of the Supreme Court of the State of Michigan be reversed by this Honorable Court, and your Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

WILLIAM E. LEAHY,
NICHOLAS J. CHASE,
Counsel for Petitioner,
Bowen Building,
Washington, D. C.

(32)

FEB 16 1943

IN THE

Supreme Court of the United States

JANUARY 1943 TERM

No. 738 - 742

THOMAS C. WILCOX, EDDIE WAY, BEN LANDSBERG, LOUIS ELLIOTT and CLYDE STAMBAUGH,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT THEREOF

JOHN J. BRESNAHAN,
Attorney for Petitioners,
Tower Building,
Washington, D. C.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

IN THE

Supreme Court of the United States

JANUARY 1943 TERM

No.....

THOMAS C. WILCOX, EDDIE WAY, BEN LANDSBERG, LOUIS ELLIOTT and CLYDE STAMBAUGH,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

(Unless otherwise clearly shown by the context, figures in parenthesis refer to the page numbers of the printed record which is a part of the certified record from the Supreme Court of the State of Michigan.)

To The Supreme Court of the United States of America:

Petitioners herein, Thomas C. Wilcox, Eddie Way, Ben Landsberg, Louis Elliott, Clyde Stambaugh, respectfully represent to this Honorable Court:

I.

That for a short statement and summary of the matters involved, they say:

1. That a document issued out of the Circuit Court for the County of Wayne (R. 28-41) by the Hon. Homer Ferguson, one of the Judges of said Court, sitting as a one-man grand jury, so-called, alleging criminal conspiracy under two counts. The first count was later dismissed during the trial, and the People proceeded to the jury on the second count, that of common-law conspiracy to obstruct justice.

That, thereafter, these defendants were arraigned before the Grand Juror, Judge Ferguson, on the said document, who also conducted the examination and upon completion of said examination, bound them over for trial. Later, an information was filed by the People and other proceedings were had in the Circuit Court for the County of Wayne; and, thereafter, a trial was had in said Court before the Hon. Earl Pugsley, one of the Circuit Court Judges of Michigan, sitting in the Wayne County, Michigan, Circuit, and a jury, and the defendants were, on the 28th day of April, A.D. 1941, found guilty by said jury, as charged (R. 1854-1892), and after denial of a Motion for a New Trial (R. pp. 2017-18), sentence was imposed on petitioners, as follows, on May 14, 1941:

Defendant and petitioner, Thomas C. Wilcox, was thereafter, on the 14th day of May, 1941, sentenced to confinement in the Michigan State Prison at hard labor for a period of not less than four and one-half (4½) years nor more than five (5) years without recommendation, and fined in the sum of $2,000.00.

Defendant and Petitioner, Eddie Way, was likewise on the 14th day of May, 1941, sentenced to be confined to

the Michigan State Prison at hard labor for a period of not less than two (2) years nor more than five (5) years; without recommendation and fined in the sum of $1,000.00. Defendants and petitioners Ben Landsberg, Louis Elliott and Clyde Stambaugh, were on May 14, 1941, each sentenced to be confined in the Michigan State Prison at hard labor for a period of not less than one (1) year, nor more than five (5) years, without recommendation and fined in the sum of $1,000.00 each.

2. That thereafter, the said cause was transferred to the Supreme Court of the State of Michigan by filing a claim of appeal, pursuant to the regular practice in the State of Michigan, for review by said Supreme Court of errors in the proceedings in the Circuit Court for the County of Wayne; that thereafter, the said Supreme Court of the State of Michigan affirmed the aforesaid conviction; thereafter, the Supreme Court denied a petition for a rehearing; thereafter, Stay of Proceedings were granted to date of February 18, 1943.

3. In this petition, Thomas C. Wilcox, Eddie Way, Ben Landsberg, Louis Elliott and Clyde Stambaugh pray this Court for a Writ of Certiorari directed to the Supreme Court of the State of Michigan to bring the record of proceedings in that Court, into this Court for review of the proceedings in the Supreme Court of the State of Michigan above alleged.

II.

For a statement of the reasons relied on for allowance of a Writ of Certiorari, and disclosing the basis on which it is contended that this Court has jurisdiction to review the determination of the Supreme Court of the State of Michigan, petitioners show:

1. That prior to September, 1940, a petition had been filed by a group of citizens with the Circuit Court for the County of Wayne asking for a grand jury investigation. After a meeting, the Circuit Judges appointed one of their members, Judge Homer Ferguson, to conduct the Grand Jury. The Grand Jury then proceeded to conduct sessions in private offices, hotels, as well as in its regular court room.

After meeting for some time, the Grand Juror returned a document which he claimed was a warrant, and proceeded to arraign these petitioners and others upon same, conducted his own examination, and bound your petitioners over for trial. He, however, did not conduct the actual trial, which was assigned to Circuit Judge Earl C. Pugsley. The said proceedings were alleged to be brought under Sec. 17217 and 17218 of the Michigan Compiled Laws of 1929.

Your petitioners state that they objected to and later filed Motion to Supress the Information filed in said cause, on the ground that the examining magistrate was the same person who conducted the Court of Inquiry or so-called one-man grand jury, issued the warrants and arraigned your Petitioners on same, and therefore was a violation of their constitutional rights, (Paragraph 2 of Motion to Quash (R. 59)). Also they claimed that they were not given the opportunity to properly examine the witnesses during the examination (see R. 612).

They also objected that Judge Ferguson should have disqualified himself when Motion was made to that effect, on January 3, 1941 (R. 59-60) and denied by trial judge.

Also see paragraphs 11 to 17 of Motion to Quash on behalf of Defendant, Duncan C. McCrea (R. pp. 69-70).

During the trial, petitioners objected to the introduction of alleged prejudicial testimony.

However, the petitioners particularly objected to the violation of their rights under the Constitution of the United States and of the State of Michigan, to their denial of a fair and impartial trial.

On this point, you petitioners claim, amongst others, two particularly glaring violations of their rights:

1. That the jury was permitted to pass on and look over some of the records and testimony of the trial while deliberating, without permission of the Court.

Apropos this incident, the record discloses the following (R. 1890):

> "The Court: Members of the Jury, I was advised by Officer Hunter that there was a request from the jury for the testimony of the witness Sam Block. The foreman of the jury may speak for you. Am I correctly advised?
>
> Foreman Holmes: That is right.
>
> The Court: It has just been called to my attention that in my absence and without any instruction from the Court, that testimony was just handed to you by the officer; is that right?
>
> Foreman Holmes: That is right, your Honor.
>
> The Court: How long ago did this happen?
>
> Foreman Holmes: About ten minutes ago."

2. That the jury which found your petitioners guilty were selected contrary to law, in violation of the statutory and constitutional rights of your petitioners, and made a supplemental motion for a new trial which was denied by the trial court (R. 2013 to 2017).

SUPPLEMENTAL MOTION FOR A NEW TRIAL

Now comes Thomas C. Wilcox, Eddie Way, Ben Landsberg, Louis Elliott, Clyde Stambaugh, the defendants herein, by George S. Fitzgerald and Frank G. Schemanske, their attorneys, and file this, their supplemental motion for a new trial, saving and reserving all rights and benefits of all matters and things and errors claimed in their motion for a new trial heretofore filed for the following reasons:

1. Because these defendants have recently discovered evidence not heretofore available to them that the panel and array of jurors from which the jury was selected and of which they were and are a part, were selected contrary to law and in violation of the statutory and constitutional rights of these defendants.

2. Because these defendants today secured evidence that the jury lists which make up the panel were not made by the Wayne County Jury Commission or any member of said Commission as provided for in Section 13838, Compiled Laws of 1939, but was made up in its entirety by the Secretary of the Jury Commission, one Clarence Shaw, the said Jury Commission having at a prior date attempted to delegate their constitutional and statutory powers and duties to the said secretary, Clarence Shaw.

3. Because the above statute provides that each Jury Commissioner shall make a list of the names of the number of qualified persons apportioned to his district, and these defendants today secured evidence that the said Clarence Shaw made up said lists from a list of registered voters using a so-called key number system, the mechanics of which he alone is familiar with, thereby excluding a large number of qualified jurors who had all

the qualifications as set forth in Section 13841, Compiled Laws, 1929.

4. Because evidence has recently been secured that up to three years ago the Wayne County Jury Commission and each of them did make a list of jurors as provided by law, but that at a meeting of the Jury Commission, they voted and attempted to delegate its constitutional and statutory duties and powers to its said secretary, and that subsequent to that meeting all lists of jurors have been made up by the secretary of the commission, as outlined above, wherefore the file and array and the jury selected therefrom was incorrect, improper and contrary to and in violation of the rights of the defendants.

5. That because the Jury Commission attempted to delegate its powers and duties to its said secretary in that it permitted him to examine and accept or reject prospective jurors called in to fill out questionnaires, and the Commission also failed to file a true list of jurors made by said Commission in the office of the Clerk of the Wayne Circuit Court, as provided by Section 13840, of the Compiled Laws, 1929.

6. Because the Jury Commission completely failed to follow the provisions of the statute as outlined in Section 13483 and the County Clerk, who is Clerk of the Circuit Court for the County of Wayne, was not permitted to write the names of persons selected as jurors on strips of paper and to deposit said strips of paper in the jury box under seal, but, on the other hand, the Commission attempted to delegate its constitutional and statutory powers and duties, and to usurp the powers and duties of the Clerk of the Circuit Court, as above entitled, by permitting the secretary to write the names of the person selected on strips of paper, sealing said strips of paper in

an envelope, and depositing said envelope with the Clerk of the Circuit Court.

7. Because the Jury Commission wholly and completely failed to follow the provisions of the statute as outlined in Section 13848, Compiled Laws, 1929, by its failure to sign the minutes made by the Clerk of the Circuit Court and file same in his office, and the Commission again usurped the powers and duties of the Clerk of the said Court by directing the secretary of the Commission to make out a "venire facias" and deliver the same to the Sheriff of Wayne County, and the said Secretary of the Commission did usurp the duties and powers of the Clerk of the Circuit Court by illegally and unlawfully making out said "venire facias" contrary to the statute as above outlined.

8. That the members of the Wayne County Jury Commission are constitutional officers, as provided in Article 8, Section 6 of the Constitution of the State of Michigan, 1908 and their attempt to delegate the powers and duties prescribed by law was and is an attempt to delegate the powers and duties of constitutional officers.

9. That the neglect and failure to act, as well as the acts performed unlawfully and illegally by said Wayne County Jury Commission, resulted in a panel and array of jurors from which the jury that tried these defendants was selected that was picked contrary to and in violation of the statute, by a person wholly without authority to pick and make up said jury lists, to-wit: the said secretary of the Wayne County Jury Commission, one Clarence Shaw.

10. Each of the foregoing errors alleged in paragraphs 1 to 9, inclusive, constitutes violation of Article 2, Section 16, of the Constitution of the State of Michigan, and of

the due process clause, privilege and immunities clause, and equal protection of the laws clause of the 14th Amendment of the Constitution of the United States, and these defendants are deprived of their rights, guaranteed thereby.

11. That the members of the jury, during the course of the trial, took notes of the testimony, which records were used by the jury during their deliberation and while attempting to reach a verdict in this cause.

Wherefore, these defendants move the Court to set aside the conviction and judgment passed thereon, and to grant these defendants a new trial herein, and, in addition to the facts set up in the defendant's attorneys' affidavit attached hereto, and this Court permit these defendants to subpoena the Secretary of the Wayne County Jury Commission, and the various Commissioners of said body, and the Clerk of the Wayne Circuit Court, and place them under oath for the purpose of completing this defendant's record in connection with this motion.

This motion is based upon the files and records in this cause, and upon the affidavit attached hereto.

(Sgd.) GEORGE S. FITZGERALD,
FRANK G. SCHEMANSKE.

Your petitioners claim that their rights to a fair and impartial trial were violated by the authorities of the State of Michigan, and that the affirmance by the Supreme Court of the State of Michigan, of the sentence imposed upon them on May 14, A.D. 1941, by the Circuit Court for the County of Wayne, deprives these petitioners of titles, rights and privileges, and immunities granted and guaranteed them under:

A. Sec. 1 of the Fourteenth Amendment to the Constitution of the United States of America, that no State shall deprive them of their life, liberty, or property without due process of law, or to abridge the privileges and immunities of citizens of the United States.

B. And a right to trial by an impartial jury guaranteed by Amendments Five and Six of the Constitution of the United States of America.

SUMMARY OF CLAIMS FOR WRIT

Petitioners were denied rights and privileges guaranteed by the due process clause of the Fourteenth Amendment and the Fifth and Sixth Amendments to the Constitution of the United States of America for the following reasons:

A. That your Petitioners were denied their rights to a fair and impartial trial as guaranteed by the Constitution of the United States (Amendments Five, Six and Fourteen), as follows:

1. That the jury which decided their case was illegally drawn and was empanelled in violation of the laws of the State of Michigan.

2. That the jury while deliberating was interfered with by a deputy sheriff attached to the Prosecution and given particular testimony, etc., without the knowledge or consent of the trial judge, rendering a fair and impartial verdict an impossibility.

3. That the proceedings by the one-man grand juror was illegal and unlawful.

4. That your Petitioners were not permitted to be confronted by the witnesses against them.

5. That your Petitioners were not permitted to waive the preliminary examination.

6. That your petitioners were also forced to permit testimony against them of similar offenses by parties who were not named in the conspiracy, either as defendant or co-conspirators.

7. That your petitioners were restricted in the cross-examination of witnesses on their grand jury testimony.

These petitioners further state that the Supreme Court of the State of Michigan, being the highest Court of said State, and it having by its final judgment deprived petitioners of certain titles, rights, privileges, and immunities, guaranteed by Section 1 of the Fourteenth Amendment and Amendments Five and Six to the Constitution of the United States of America, as aforesaid, it is claimed that this Court has jurisdiction of the subject matter herein involved under Section 237 (b) of the Act of Congress of February 13, 1925, Chapter 229, 43 Sta. 936, which is as follows:

> "It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest Court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exer-

cised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal Claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

Wherefore, petitioners herein, Thomas C. Wilcox, Eddie Way, Ben Landsberg, Louis Elliott and Clyde Stambaugh pray that this Court by its Writ of Certiorari, directed to the Supreme Court of the State of Michigan, require that the records in this cause be certified to this Court for review and determination of the final judgment of that court in said cause.

And petitioners will ever pray, etc.

JOHN J. BRESNAHAN,
Attorney for Petitioners,
Tower Building,
Washington, D. C.

IN THE

Supreme Court of the United States

JANUARY 1943 TERM

No.....

THOMAS C. WILCOX, EDDIE WAY, BEN LANDSBERG, LOUIS ELLIOTT and CLYDE STAMBAUGH,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF JURISDICTION

Petitioners, herein, pray this Court for a Writ of Certiorari to the Supreme Court of the State of Michigan to review the affirmance by that Court of which it denied a rehearing of petitioner's conviction of a felony commonly known as accepting bribe by a public officer, in the Circuit Court for the County of Wayne, and the said

Supreme Court of the State of Michigan being the highest court of said state, and it having by its final judgment deprived petitioners of certain titles, rights, privileges, and immunities, guaranteed by Section 1 of the Fourteenth Amendment, and Amendment Six of the Constitution of the United States of America, as aforesaid, it is claimed that this Court has jurisdiction of the subject matter herein involved under Section 237 (b) of the Act of Congress of February 13, 1925, Chapter 229, 43 Sta. 936. This has already been discussed under the Summary of Claims for Writ in the Petition.

II.

STATEMENT OF FACTS

This brief is filed in support of a petition for a writ of certiorari to the Supreme Court of the State of Michigan to review that Court's affirmance of Petitioners' conviction on the charge of conspiracy to permit gambling and the operation of houses of ill-fame, (Count 2, R. 34-43) in the Circuit Court for the County of Wayne.

Petitioners were convicted before the Hon. Earl C. Pugsley, one of Michigan's Circuit Judges sitting in the Wayne Circuit by a jury, of the crime commonly known as common-law conspiracy, and sentences were imposed on May 14, 1941, as follows:

Defendant and Appellant, Thomas C. Wilcox, was thereafter on the 14th day of May, 1941, sentenced to confinement in the Michigan State Prison at hard labor for a period of not less than four and one-half (4½) years nor more than five (5) years without recommendation, and fined in the sum of $2,000.00.

Defendant and petitioner, Eddie Way, was likewise on the 14th day of May, 1941, sentenced to be confined to the

Michigan State Prison at hard labor for a period of not less than two (2) years nor more than five (5) years; without recommendation and fined in the sum of $1,000.00. Defendants and appellants, Ben Landsberg, Louis Elliott and Clyde Stambaugh, were on May 14, 1941, each sentenced to be confined in the Michigan State Prison at hard labor for a period of not less than one (1) year, nor more than five (5) years, without recommendation and fined in the sum of $1,000.00 each.

Thereafter, your Petitioner, appealed to the Michigan Supreme Court, which affirmed the conviction. A petition for a rehearing was denied.

Petitioner, Thomas C. Wilcox, at the time this matter arose, was the duly elected and qualified Sheriff of Wayne County, Michigan. Your other petitioners are citizens of the State of Michigan.

Petitioners herein ask for a writ of certiorari to review the actions of the Supreme Court of Michigan.

III.

SUMMARY OF ARGUMENT

Petitioners were denied rights and immunities guaranteed by the due process clause of the Fourteenth Amendment and the Fifth and Sixth Amendments to the Constitution of the United States for the following reasons:

That your Petitioners were denied their rights to a fair and impartial trial as guaranteed by the Constitution of the United States (Amendments Fourteen, Five and Six) as follows:

1. That the jury which decided their case was illegally drawn and was empanelled in violation of the laws of the State of Michigan.

2. That the jury while deliberating was interfered with by a deputy sheriff attached to the Prosecution and given particular testimony, etc., without the knowledge or consent of the trial judge, rendering a fair and impartial verdict an impossibility.

3. That the proceedings by the one-man grand juror was illegal and unlawful.

4. That your Petitioners were not permitted to be confronted by the witnesses against them.

5. That your Petitioners were not permitted to waive the prelminiary examination.

6. That your Petitioners were also forced to permit testimony against them of similar offenses by parties who were not named in the conspiracy, either as defendants or co-conspirators.

7. That your petitioners were restricted on the cross-examination of witnesses on their grand jury testimony.

IV.

ARGUMENT ON QUESTIONS INVOLVED

Question 1. Jury was illegally drawn and was empaneled in violation of the laws of the State of Michigan.

A supplemental motion for a new trial was argued before the trial Court and denied (R. 2013-18) and the Court's decision was affirmed by the Michigan Supreme Court.

For the facts regarding this question, see Supplemental Motion for a New Trial in the Petition in which same are set out.

Amendment VI of the Constitution of the United States reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense."

Amendment five of the Constitution reads in part:

> "No person shall be * * * compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." The phrase "trial by jury" as used in the Federal Constitution means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and in England when the Constitution was adopted.

The State of Michigan provides for a trial by a jury of twelve citizens and the Statute provides the ways and means of securing a fair and impartial jury.

The statute follows:

> "13838 Meetings, division of Detroit into districts, apportionment of jurors to be returned. Sec. 2. Said board shall meet at the office of the board provided for it by the board of auditors on the second Monday in May of each year, at ten o'clock in the forenoon, and having divided the territory within the city of Detroit into five districts, which shall be equal as near as possible, shall assign one of such districts to each of the commissioners who are residents of said city; and like assignment of the territory outside of said city shall likewise be made to the remaining commissioners. They shall also apportion among said commissioners and their respective districts the number of petit jurors to be returned for each of the courts as provided by this act. Said apportionment shall be made according to the number of inhabitants in the territory assigned to each commissioner by the last preceding general census taken by this state or the United States: Provided, that in taking an apportionment and return of petit jurors for the circuit court, not less than seven jurors shall be apportioned to and returned for any township or ward: And provided further, That in making a return of jurors for the city of Wyandotte, such jury shall be returned at large from said city, and the same as though it had not been divided into wards.
>
> "13839 Duty of Commissioners; filing of lists. Sec. 3. Each of said commissioners shall make a list of names of the number of qualified persons apportioned to his district as aforesaid, to serve as petit jurors for the ensuing year, for each of the courts of record in Wayne county, for which jurors are required by law to be summoned. They shall also make a list of names of persons to serve

as jurors in the police court of the city of Detroit in the same manner as the making of such list is provided for in section twenty-two of act number two hundred and eighty-seven (287) public acts of eighteen hundred and eighty-seven by the board of jury commissioners herein specified. Said lists, as soon as they are made, and prior to the third Monday in May, shall be filed with the secretary of said board of jury commissioners.

"13840 Meeting of board; lists; completion, certification and filing. Sec. 4. The board of jury commissioners shall meet at the office of the board on the fourth Monday in May in each year at ten o'clock in the forenoon and they shall proceed to examine the lists of persons returned by each of the said commissioners as aforesaid, and if, in the judgment of said board, the persons whose names were so returned are suitable persons, having the qualifications of jurors, and not exempt from service as such, said board shall make therefrom a complete list of persons for each of the courts for which lists of jurors are required to be returned, which list shall be recorded at length, in the records of said board, and a copy thereof shall be made, certified to be a true list of jurors made by said board for the court, naming it, for which it is made for the then ensuing year, which certificate shall be subscribed by said commissioners, or a majority of them, and shall be filed in the office of the clerk for the court for which said list shall be made. If, in the judgment of said board, any of the persons whose names are contained in the list returned by said commissioners, respectively, are not suitable to serve as jurors, or if they are exempt or not qualified, such names shall be omitted from the lists required by this section to be made by said board, and in place of the names so omitted, said board shall select and include in said list made by the board, names of suitable and eligible

persons, sufficient in number to complete said list, and if any of said commissioners shall neglect to return the list of names as aforesaid for his district as aforesaid, said board shall select and return in the lists to be made by them, names of suitable and eligible persons sufficient to complete the same. Such list shall state the township and ward in which the persons returned, respectively, are resident, and if they reside in the city of Detroit, shall state the place of residence by reference to street and house number. The name of a commissioner shall be returned in said lists.

"13841 Jurors; qualifications, examination by judge, cause for challenge, persons excused. Sec. 5. The persons whose names shall be returned by said board of jury commissioners shall be suitable to serve as jurors. They shall have the qualifications of electors in the town or ward in which they reside and for which they are returned by said board; they shall be persons of good character, of approved integrity, of sound judgment and well informed, conversant with the English language, in possession of their natural faculties, not infirm or decrepit, and otherwise free from all legal exceptions. No person shall be returned or shall be qualified to be or become one of a panel of petit or grand jurors in any court of record in Wayne County who within three years prior thereto has been or acted as a member of a panel of petit or grand jurors whether summoned on the original panel or added thereto as talesmen, in a court of record, except as otherwise provided in section 21, and it shall be the duty of each of said courts on the return day of the venire to inquire of the jurors summoned if any of them have served as jurors during the preceding three years and to excuse from service any jurors who have so served. It shall also be the duty of the judges of each of said courts by special orders to be entered upon the court journal to cause examination and investigation to

be made into the qualifications of each and every juror, who shall be summoned as provided by this act, and to direct the manner in which such examination and investigation shall be made; and neither of said courts shall allow any person to be or become one of a panel of petit or grand jurors therein until it shall be made to appear to the satisfaction of such court, after such examination and investigation, that such person has all the qualifications specified in this section. It shall also be the duty of each of said courts forthwith to excuse from service as jurors any and all persons who shall not so be shown to possess all of such qualifications. The particular manner in which such examination and investigation has been made shall be set forth in the journal of said court; and it shall be a just cause of challenge to any juror in any cause, over and above all other challenges allowed by the law, that it does not so appear in and by said journal that such juror has all of said qualifications. And it shall also be the duty of each of the judges of said courts, whenever he shall have reason to doubt whether any person in attendance upon said court as a juror is possessed of all of said qualifications, forthwith to excuse such juror from further attendance and service as such juror.

"13842 Names to be returned each year. Sec. 6. There shall be returned each year by the said board to serve as jurors in the circuit court of said county the names of three hundred persons who shall be residents of said county and as petit jurors in the recorder's court of the city of Detroit the names of six hundred persons who shall be residents of said city but either of said courts may direct a different number of persons to be returned by said board by an order to be entered on its journal, a copy of which order, certified by its clerk, shall be delivered to the secretary or president of such board at least thirty days prior to said

second Monday in May, and said board shall thereupon return for said court the number of names mentioned in said order.

"13843 Duty of clerk's on receipt of list; sealing of jury box. Sec. 7. The Clerk of the court, on receiving said list shall file it in his office, shall forthwith write the names of the persons thus selected on separate strips of paper of the same size and appearance, as nearly as may be, shall fold up each of said strips of paper in the same manner so as to conceal the name thereon, and deposit and preserve the same in a box, to be called and labeled 'Jury Box,' and the persons whose names are thus returned and deposited in said jury box shall be liable to serve as jurors for one year and until another list shall be selected, returned and filed with said clerk, and the names thereon deposited in said jury box in the manner aforesaid. Immediately upon the depositing of the names so returned, in the jury box, the clerks shall seal up such lists (list) of jurors and said list shall remain sealed unless otherwise ordered by the presiding judge of the court for which such list is filed."

Your petitioners claim that the authorities of the State of Michigan did not follow the statute and as a result no fair and impartial jury was drawn. They had a right to believe and to expect that when they questioned and challenged the jurors that such jurors had been properly drawn. Such, however, was not the case, and your petitioners believe and say that the said illegal method of drawing the jurors was for some ulterior motive of defeating justice and to "railroad" your petitioners. *Glasier v. U. S.*, 315 U. S. 60, 85-87; *Kentucky v. Powers,* 201 U. S. 1; *Pierre v. Louisiana,* 306 U. S. 354.

Question 2. That the jury while deliberating was interfered with by a deputy sheriff attached to the trial court.

A person is entitled to a fair and impartial verdict by the jury and interference by a deputy sheriff without the authority of the court in an attempt to help the jury to arrive at a verdict is strictly an attempt to deprive your Petitioners of a fair and honest verdict, and follows by innuendo the schemes stated in Question 1 to make sure that your petitioners would not receive a fair and impartial verdict. The Michigan Supreme Court laid down the basic principle in *Findley v. People,* 1 Mich. 234. "Jurors may, with the consent of the parties, take papers and exhibits received in evidence into the jury room, but they have no right to take other papers." This rule laid down by the Michigan Supreme Court was followed in *People v. Dowdigan,* 67 Mich. 92, (This Court has repeatedly asserted that unauthorized communication between the officer who attended the jury and the jury are grounds sufficient to set the verdict aside. *People v. Knapp,* 42 Mich. 267; *People v. Montague,* 71 Mich. 447; *People v. Levey,* 206 Mich. 129; *People v. Chambers,* 279 Mich. 73) but was discarded in their decision in this cause, in violation of the rights of your petitioners as guaranteed by Amendments 5, 6 and 14 of the Constitution of the United States.

Question 3. That the proceedings by the one-man grand juror was illegal and unlawful.

Your petitioners contend that they were forced to go through a trial based on an illegal document, claimed to be a warrant which was issued by a one-man inquisitorial body, in the form of Judge Homer Ferguson, who forced

them to go through a preliminary examination before himself and bound them over for trial.

The Constitution of the State of Michigan has guaranteed the accused the right to a fair and impartial trial. The Legislature has likewise enacted a statute to guarantee the accused a fair and impartial examination.

Compiled Laws '29, Sec. 17193, Stat. Ann. 28919, Section 1, reads:

> "The state and the accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes, and it is hereby made the duty of all Courts and public officers having duties to perform in connection with such examination to bring them to final determination without delay, except as it may be necessary to secure to the accused a fair and impartial examination."

Further, *Gillespie's Michigan Criminal Law and Procedure* comments in paragraph No. 426 at p. 504 in Volume 1:

> "Prejudice or bias, in order to disqualify a judge, must be present in fact and can never be based upon his decision in due course of judicial proceedings. Unless the fact of prejudice or bias is established, or the necessities of justice to the defendant require it; a change of judge is an injustifiable wrong to the public, for it works delay, entails expense and endangers the prosecution."

The text cites in support thereof, *Kolawich v. Ferguson*, 264 Mich. 668.

Petitioners herein invoke the statute, therefore which affords delay where it is necessary "to secure to the accused a fair and impartial examination."

Further, petitioners claim that because of the peculiar nature of the Grand Jury itself as being an inquisitional body, delving and probing into the matters beforehand, that this *prima facie*, establishes of necessity that bias and prejudice as suggested hereinbefore, and in the case of *Kolawich v. Ferguson, supra,* is actually present so as to preclude Judge Homer Ferguson from conducting a fair and impartial examination.

The motion to disqualify said Judge Ferguson having been seasonably made, should have been granted.

Question 4. That your petitioners were not permitted to be confronted by the witnesses against them.

Several witnesses testified as to letters, statements and conversations with persons now deceased or missing and your petitioners had no opportunity to cross-examine these persons, and were denied such opportunity.

From the testimony of William Dowling (R. 88):

> "* * * I called for the Superintendent of Police, found that Fred Clark was acting as Superintendent of Police in the absence of Fred Frahm, who was out of town. I asked that the Chief of Detectives come to my office. I told him that this man, William McBride, whose name had been mentioned in these letters as being the payoff man by and between certain gamblers and the Police Department should be apprehended and held incommunicado until I had talked to him first.
>
> Mr. Schemanske: Just a minute, your Honor, please, I think I want to renew my objection again, for the reason that certainly it is very prejudicial and certainly would have no bearing upon the defendants in this particular cause. There are no police officials of the City of Detroit charged here,

and this charge here is conspiracy to obstruct justice'' (89).

Despite numerous objections the Court permitted Dowling to continue:

> "The Police Department under the direction of Fred Clark, did not continue to investigate the matter. As a matter of fact on the contrary, Fred Clark, absolved the officers and terminated the investigation, as far as I know. He exonerated the officers (105).
>
> Mr. Fitzgerald: May the Court please, I object to this line of testimony. It has no probative value here. * * * I ask that all that be stricken (105).
>
> The Court: The motion is overruled'' (106).

The record in this cause clearly shows that the testimony of Fred Clark is irrelevant and incompetent and critically prejudicial. The trial court's erroneous ruling in allowing this testimony to be adduced, was a direct violation of the defendant's constitutional right to a fair and impartial trial. It served no purpose other than to becloud the issue and to befog the minds of the jury, by inference that your petitioners were connected with charges against the Metropolitan Police Department.

Has not the Michigan Supreme Court held in substance in *People v. Knap,* 26 Mich. 112:

> "'* * * There can be no criminal responsibility against one who was himself engaged in the acts of his associates, unless it is within the scope of a combination to which he was a party and thus authorized by this joint act. * * *.''

Fred Clark not being a party indicated in the instant case was in no way a party to any combination which touched and concerned the instant case. We submit the Court should have excluded the testimony.

Over objections of defense attorneys, Witness Dowling was allowed to go on unbridled, in his narrative concerning these letters and other prejudicial subjects, which could not be cured by later instruction.

The Michigan Supreme Court has referred to this type of testimony and its effect on the jury; in an instance where prejudicial remarks of counsel was the medium of bias and prejudice.

The case of *People v. Kolawich,* 262 Mich. 137, is analogous to the instant case in so far as the effect of prejudice on the minds of the jurors. Said the Court:

> "* * * It is true that the trial judge expressly instructed the jury to disregard the remarks but the damage is done. An ink spot may be blotted out in part, but the stain still remains."

The Michigan Supreme Court has held likewise in *People v. Bigge,* 288 Mich. 417 (p. 421) that:

The responsibility of maintaining the right of fair trial and due process of law, is placed within the judicial branch and cannot be otherwise by legislative permission."

See also: *People v. Nixon,* 243 Mich. 630.

We submit further, that the error complained of has resulted in a miscarriage of justice within the purview of Michigan Compiled Laws 1929, Section 17354.

And then again when witness Sam Block testifies:

> "Following that conversation with Colburn, I contacted several people in Hamtramck, Wayne County. I contacted Elik Gell. As far as I know, he is dead. I believe he died within the last few months. I didn't know exactly what his business

was at the time. I knew later on he was a handbook operator. I knew that he knew most of the people out there, that were in the different illegal businesses. On that occasion or at that time, I had a conversation with Elik Gell with reference to the illegal enterprises in Hamtramck.

Q. Tell us what this conversation was with Gell?

Mr. Maiullo: Just a minute I object to that. Unless there was somebody else present, certainly it is equally within the knowledge of the deceased and how can we disprove it (248).

Mr. O'Hara: That rule does not apply in criminal cases, in the first place. And in the second place, Elik Gell is charged as a co-conspirator, was not apprehended and he is now dead. We can't help it because he died. So I say that they being co-conspirators, he being charged, rather as a co-defendant—not as a co-conspirator, he was charged as a co-defendant, that whatever transpired between this witness and Elik Gell is competent proof (249).

Mr. Maiullo: The only theory that you can introduce that is on the ground of agency, isn't it? If this man acted as agent of Elik Gell, he might testify. But if Elik Gell is dead, how can we tell (249)?

Mr. O'Hara: We are asking Mr. Maiullo, on the ground that he is a co-defendant in a conspiracy (249).

Mr. Fitzgerald: I would like to have the benefit of that objection for the clients I represent and also Mr. Schemanske's (249).

Mr. Willard: I make the further objection that Elik Gell is now dead and he couldn't be a co-defendant. That is on behalf of Bertha Malone (249).

Mr. O'Hara: Of course, your Honor, I might say, so that the Court will understand the situation clearly, that at the time this warrant was issued and he was charged as a co-defendant, he was not dead (249).

The Court: I understood that.

Mr. Darin: There is no proof of his death, as to the time. We merely have Mr. O'Hara's statement not under oath that he is dead (249).

Mr. O'Hara: It doesn't make any difference whether he is dead or not, he is a co-defendant, not apprehended" (249).

After considerable argument—

"The Court: I am ruling he may answer the question" (251).

After which Sam Block continued in his testimony concerning Mr. Gell and how Gell collected from illegal establishments in Hamtramck, which testimony was very prejudicial to the defendants (251 to 253).

Under what theory Sam Block's testimony concerning Elik Gell's activities is admissible is an enigma to these petitioners. It is axiomatic that death abates a prosecution against the accused. Therefore if witness Block's testimony were elicited from him on the theory that Elik Gell was a co-defendant and therefore binding as to him, and if as stated by prosecution Gell was dead, the case as to him is abated and evidence against him is surplusage as to him; excepting, however, that this testimony concerning Gell as adduced from Sam Block was deeply prejudicial as to the other defendants and your petitioners.

Sec. 17319 Michigan C. L. 1929; Sec. 281049 Stat. Ann. reads:

"Testimony taken at an examination, preliminary hearings, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the

> witness giving such testimony cannot, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify."

Michigan Criminal Laws and Procedure by Gillespie, notes (Sec. 417 at page 482) concerning this statute:

> "Prior to the enactment of the statute it had been held proper to admit the testimony of a witness given at a former trial or preliminary examination when the witness was dead; outside the jurisdiction of the Court; too ill to attend the trial or the prosecution was unable after diligent search to procure his attendance, but not, where it did not appear what efforts had been made to secure his presence. The rule, however, does not admit testimony given at a coroner's inquest, an extradition hearing, or a trial of a co-defendant."

The Supreme Court in commenting on this type of evidence as referred to in the foregoing statute, held in *People v. Dowdigan,* 67 Mich. 95, in substance:

> "* * * This recognized exception to the general rule, does not abridge the defendant's constitutional right to be confronted with the witnesses against him, because he was present in Court when the former testimony was given, and had a full opportunity to avail himself of all rights of cross-examination * * *."

We submit, therefore, that the statute just quoted limited the admission of former testimony under oath to certain circumstances, that this statute was quoted to show the safeguards that have been thrown about, the acceptance of testimony of absent witnesses, to emphasize the fact that nowhere in the statutes or in the law prece-

dent is their authority to admit in evidence, testimony such as was Sam Block's, relative to the deceased co-defendant, Elik Gell.

On the contrary the statute hereinbefore quoted is predicated on the theory as insisted upon by the Supreme Court in *Walterhouse v. Walterhouse,* 130 Mich. 89.

People v. Case, 105 Mich. 92;
People v. Meyers, 239 Mich. 105.

That there must have been opportunity for cross-examination.

Your petitioners state that their rights to a fair and impartial trial were violated and abused in defiance of their rights guaranteed by the Constitution of the United States.

Question 5. That your petitioners were not permitted to waive to the preliminary examination.

Paragraph 2 of the Motion to Quash, herein referred to (59) avers as follows:

> "That the examination was illegal in that this defendant attempted to waive examination and in spite of his waiver, the examining magistrate forced this defendant into the examination of this cause in violation of his constitutional rights."

Again objection by Mr. McCrea in which he objected to the use of the record of the examination, because (612):

> "* * * I claim at the examination the constitutional rights of the defendants, including this defendant, were breached and violated because they were not given proper opportunity to cross-examine the witnesses at that time."

Again by Mr. Schemanske:

> "And I further object, if your Honor please, for the following reasons: First, that the examination was not conducted for all the defendants in this case, the charges being conspiracy. Some of the defendants were not present at the examination" (612).

The statute relative to the holding of a preliminary examination and which gives the accused the right to waive such examination reads:

> "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefore, as provided by law, before a Justice of the Peace or other examining magistrate or officer, unless such person shall waive his right to such examination." * * *
>
> Sec. 17256 C. L. 1929; Sec. 28982 Stat. Ann.

The foregoing establishes, therefore, that a defendant may not be forced legally to undergo a preliminary examination; that he has therefore, the legal right to waive said examination.

Now deductions from either premise—first, that where a court forces a defendant to undergo preliminary examination despite said defendants' waiver thereof; or where a court proceeds with a preliminary examination where all the defendants are not present, and hence taking testimony in their absence, leaves the court proverbially between the horns of the dilemma. In the first instance the Court has violated the defendant's statutory right of waiving the examination as hereinbefore quoted; in the second by taking testimony in the defendant's absence, the Court militated against the defendant's right to be

confronted with the witness against him as guaranteed by the Michigan Constitution 1908, Article 2, Section 19. And as further having been classified by the Michigan Supreme Court, which held:

> "Nothing in the nature of testimony may be taken in the absence of the accused."
>
> *People v. Raider,* 256 Mich. 131.

Question 6. Your petitioners were also forced to permit testimony against them of similar offenses by parties who were not named in the conspiracy either as defendants or co-conspirators.

Neither Everett Watson or Elmer Ryan were named as co-conspirators or as defendants (see Record p. 305) but the record discloses that witness Block was asked how much Mr. Ryan gave him in 1937.

Mr. Schemanske thereupon objected. Prior to this, Sam Block was asked (274-275) concerning payments by Everett Watson. Whereupon counsel for defendants objected. Mr. O'Hara sought to justify the questions concerning Mr. Ryan and Mr. Watson as being within purview of Sec. 17320 (275). The Court allowed Block to continue in his testimony concerning Ryan and Watson on the theory as bearing upon the question of intent or the general plan or scheme of things (307).

Now there is nothing in the record connecting Elmer Ryan and Everett Watson with the instant case, except the claim by the prosecutor that he would show intent, etc., per Sec. 17320 C. L. 1929.

Intent or guilty knowledge is a necessary conclusion from the charges in the information. Acts done in accord-

ance thereto are not susceptible of any theory of accident, the crime charged often leaves no inference other than that it was done with guilty knowledge and intent.

The Michigan Supreme Court said:

> "The prosecuting attorney in his opening statement charged defendant was guilty of forgery. On the trial he offered proof of it. The forgery, if any existed, which is, under the testimony doubtful, related to a separate and distinct transaction. The proof offered was proof to establish a separate and distinct offense. The prosecuting attorney was in error in making reference to the jury, thereto in his opening statement. The trial Court was in error in receiving proof of such forgery."
>
> *People v. Lewis,* 264 Mich. 83.

See also:

> "Where the intent or guilty knowledge is a necessary conclusion from the act done, proof of other offenses of a similar nature or character is inadmissible and violates the rule that the evidence must be confined to the issue. Upon the record, there is no room for an inference that death resulted from accident or that the operation was performed to save the life or health of the deceased. On the contrary, if the jury found that the dying declaration of the deceased was true, the crime was complete, and the jury could not find otherwise than that it was done with guilty knowledge and intent. This testimony should have been excluded and for this reason the conviction must be set aside."
>
> *People v. Lansdale,* 122 Mich. 388 (p. 392).

See also: *People v. Trudell,* 220 Mich. 166;
People v. Kirilidis, 285 Mich. 694;
People v. Wright, 294 Mich. 20;
People v. Dean, 253 Mich. 434.

The testimony relative to Ryan and Watson was hence exceedingly prejudicial to the accused.

Question 7. That your petitioners were restricted in their cross-examination of witnesses on their grand jury testimony. The trial court adopted the policy and theory of the prosecution that: "He has no right to ask any questions about what happened in the grand jury unless I bring it out, and that is the law" (R. 361-364).

The opinion of the Supreme Court of the State of Michigan states that with respect to the denial of petitioner's efforts to lay a foundation for impeachment of witnesses by bringing out what their testimony before the grand jury had been, that the petitioner

> "could have examined or cross-examined witnesses without referring to their grand jury testimony. If he was not satisfied with their testimony, he could have called either Judge Ferguson or the stenographer who took the grand jury testimony to testify as to whether the witnesses' testimony before the grand jury was 'different from' the evidence given by such witnesses at the trial" (R. 2096).

That this is no answer is made only too clear by the ruling of the Trial Court holding that petitioner "could not go into the grand jury here" (R. 242) and that the petitioner had "no right to ask any question about what happened in the grand jury" unless first developed by the government (R. 361-364, 479). In each instance the Trial Court sustained the prosecutor's objections "to any question with reference to the grand jury testimony" (R. 362). Thus there was real merit to petitioner's contention that it would have been futile to call Judge Fergu-

son (the one-man grand juror, notwithstanding what the Court below says (R. 2097)). Assuming that Judge Ferguson could have been called, the right to cross examine should not have been so delimited.

We are at a loss to understand a theory that permits the prosecution to lay a foundation for impeachment but denies the same opportunity to the defendant. We know of no policy, State or Federal, sanctioning one rule of evidence in favor of the State and following the opposite of the rule against the defendant. No traditional rule of secrecy of grand jury proceedings is in any way involved. The viciousness of so restricting the petitioner goes to the right of cross examination which this Court has held to be a fundamental right and of the essence of due process of law.

In *Alford v. United States,* 282 U. S. 687, it is stated that

> "The cross examination of a witness is a matter of right." *The Ottawa,* 3 Wall. 268, 271.
>
> "Its permissible purposes, among others, are * * * that facts may be brought out tending to discredit witness by showing that his testimony in chief was untrue or biased. *Tla-Koo-Yel-Lee v. United States,* 167 U. S. 274; *King v. United States,* 112 Fed. (2d) 988; *Farkas v. United States,* 2 Fed. (2d) 644; see *Furlong v. United States,* 10 Fed. (2d) 492; 282 U. S. 692,"

The vital importance of permitting such cross-examination lies in the realization that counsel

> "cannot know in advance what pertinent facts may be elicited on cross examination. For that reason it is necessarily exploratory; * * * it is the essence of a fair trial that reasonable latitude be given the

> cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop * * *. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. *Nailor v. Williams,* 8 Wall. 107, 109."

In the present case, some of the witnesses to whom questions were propounded with respect to their grand jury testimony were co-defendants who had turned state's evidence. The essential need for permitting the defense to test their credibility, in the light of what they might have previously testified to before the grand jury prior to immunity granted, is epitomized in the language of Chief Justice Stone in *Alford v. United States,* 282 U. S. 687, wherein he states that the defendant should be permitted to show by such facts as proper cross-examination might develop that the testimony of the witness was biased because "given under promise or expectation of immunity or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution."

Clearly the Trial Court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination (282 U. S. 694). *Cf. Gaines v. United States,* 277 U. S. 81, 85; *Dowell v. United States,* 221 U. S. 325.

In the setting of the trial below a substantial right was denied. Wigmore has said "if we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improve methods of

trial-procedure." *Wigmore on Evidence,* (3 ed.) Sec. 1367, page 29.

The ruling of the Court below is contrary to every known authority: *Regina v. Gibson,* 1 Car. & M. (41 Eng. Com. L. 364); *State v. Silverman,* 100 N. J. L. 249, 252, 253; *Commonwealth v. Mead,* 12 Gray (Mass.) 167; *Burdick v. Hunt,* 43 Ind. 381-9.

This Court has stated that while due process is essentially a matter of state law, that nonetheless there must be an adequate opportunity to be heard and to defend. What could be more important to the defense of petitioners in a conspiracy case than the opportunity to lay a foundation for the impeachment of his alleged co-conspirators, some of whom had turned state's evidence, and left him in the position of pitting his word against theirs?

Petitioners ask for a writ of certiorari from this Court to the Supreme Court of the United States of America to review its affirmance of the sentences imposed by the Circuit Court for the County of Wayne, Michigan, and said Supreme Court's denial of an application for a rehearing.

Respectfully submitted,

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EXHIBIT 1

MICHIGAN SUPREME OPINION

People v. Thomas C. Wilcox

STATE OF MICHIGAN—SUPREME COURT

The People of the State of Michigan,
Plaintiff and Appellee,
v.
Thomas C. Wilcox, et al.,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH, except Wiest, J., and Boyles, J., Butzel, J.

Thomas C. Wilcox, one of the defendants in the case of People v. Wilcox, McCrea, et al., filed a separate appeal. It is presented together with the separate appeals of other co-defendants, and comes to us on the same record that was presented in the appeals of Mr. McCrea and the other separate appellants. In the opinions filed this day in the appeals of defendant McCrea and other co-defendants, we discussed and decided almost all of what we regard as the important questions raised by appellant on his appeal. We, therefore, find it unnecessary to repeat what was said in the opinions deciding the appeals of McCrea and others, but include what was said therein by reference and without repetition. There are but few other questions raised by appellant Wilcox that in our opinion require discussion.

The general outline of the charges against appellant Wilcox and others is set forth in the statement of fact in the McCrea opinion. As the question of the weight of the evidence only was raised by appellants McCrea, Garska and

Scaduto and not by appellant Wilcox or any of the other co-defendants, it becomes necessary to go into more detail in this opinion in regard to the testimony offered by the prosecution.

Appellant claims, that, as the Honorable Homer Ferguson, Circuit Judge, was designated to make an investigation into certain conditions claimed to have existed in Wayne County, thus he was limited in scope in inquiring into gambling conditions; that he could not investigate other vice conditions. Unfortunately, the petition and order for the investigation have not been included in the record. The petition for the investigation of suspected offenses was made in accordance with 2 Comp. Laws 1929, Sec. 17217 (Stat. Ann. Sec. 28.943). The special prosecutor, however, calls our attention to the fact that the petition has been before us in other cases and that we considered it in In re Watson, 293 Mich. 263. The petition, as shown in the *Watson case* was "for the purpose of investigating the existence of gambling and the possible protection thereof by any officials in Wayne County, and matters relating thereto, including any failure to enforce the criminal law prohibiting gambling and the operation of gambling institutions and possible connection between such enterprises and law enforcement officials." Through an abundance of caution, we have sent for the original petition and find that it stresses the corruption of law-enforcing officials in connection with such gambling. It further states that there was probable cause to suspect that certain crimes, causes and misdemeanors had been committed within the county of Wayne, State of Michigan, and particularly that such gambling has been permitted with the knowledge and consent of law-enforcing officials.

Appellant claims that a one man grand jury having been appointed for the special purpose of investigating gambling

could not go on a "fishing expedition" to investigate crime in general. Section 17217, 3 Comp. Laws 1929 (Stat. Ann. Sec. 28.943) reads as follows:

> "Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discreation may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings."

The prosecution claims that the statute does not restrict the scope of the investigation when once begun. The question before us in the instant case is further limited to the query whether in an investigation involving corruption and connivance of public officials in permitting commercialized gambling, if the testimony develops that the same persons who exacted payments from gambling houses also collected from the operators of houses of prostitution and other illegal enterprises and paid all of such sums to the same officials, an indictment should not include the entire conspiracy and all the conspirators.

In the case of Hale v. Henkel, 201 U. S. 43, Mr. Justice Brown quoted with approval from a lecture given by Mr. Justice Wilson of the United States Supreme Court as follows:

> "It has been alleged that grand juries are confined in their inquiries to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court; they are appointed for the government and for the people; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment which the law denounces."

The testimony shows that the conspiracy was for the purpose of collecting money from all types of illegal business, including vice. The examining magistrate did not exceed his authority.

Appellant Wilcox claims it was error to introduce testimony in regard to the suicide of Mrs. Janet McDonald and the murder of her child, and the letters she left claiming corruption of public officers. It was shown that defendant McCrea not only refused to do anything in regard to the charges but even attempted to stop an investigation. This became very material as far as defendant McCrea was concerned and the testimony was admitted as to defendant McCrea. The court distinctly stated that the testimony in regard to Mr. McCrea's conversation with Mr. Dowling

could not be binding on anyone except defendant McCrea until the conspiracy was established. The court repeated this statement. The testimony was material as far as McCrea was concerned and properly received in evidence. It is true that frequently testimony, introduced in a conspiracy case, may not be binding upon all of the conspirators, but nevertheless it may be material in the proofs against some defendants and if the conspiracy is once established, such testimony may affect all conspirators but it is one of the penalties that they suffer.

Specific objection is now made for the first time to the testimony in regard to Mrs. McDonald's letters. As such objection was not made at the trial, we need not discuss it.

The testimony showed that one Elik Gell took a very prominent part in the conspiracy. At the request of Block, the collector for defendants McCrea and Colburn, Gell made collections from various illegal business in the city of Hamtramck. To prevent interference with various forms of vice in the Hamtramck district, where it flourished, Gell paid Block $2,800 a month for the prosecutor's office. He also collected for the sheriff's office. Block also testified that he personally paid to Gell monthly sums for the sheriff's office so that Block could operate a handbook in Hamtramck. Block, testifying to his dealings with Gell, was asked: "Tell me about this conversation with Gell?" immediately the attorney for one of the defendants objected. He stated that unless there was someone else present it was within the knowledge of the deceased and "how can we disprove it." Later on he further stated that "the only theory on which you can introduce this is on the ground of agency. If the witness was the agent of Elik Gell, he could testify. If Elik Gell is dead, how can he testify?" The special prosecutor stated that the rule defendant's counsel invoked only applied to civil cases; fur-

ther, that Gell was a co-conspirator and a co-defendant who had died prior to the trial. The objection was not properly made. In appellant's brief, however, the argument is made that the accused always has the right to be confronted with the witnesses against him and that there would be no way of disproving a conversation had with the deceased person in his lifetime.

The relations with Elik Gell were part of the res gestae and everything that Gell did was in furtherance of the conspiracy. Our attention has been called to only one case of very high authority where the precise question has arisen. A similar objection was made as to the admissibility of testimony showing what the co-conspirator, who died prior to the trial, had said in his lifetime in furtherance of the conspiracy. In Delaney v. United States, 263 U. S. 586, the court said:

> "The only exception, however, was of testimony given by one of the conspirators of what another one of the conspirators (the latter being dead) had told him during the progress of the conspiracy. We think the testimony was competent and within the ruling of the cases. American Fur Co. v. United States, 2 Pet. 358, 7 L. ed. 450; Nudd v. Burrows, 91 U. S. 426, 438, 23 L. ed. 286, 289; Wiborg v. United States, 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197. And it has been said that the extent to which evidence of that kind is admissible is much in the discretion of the trial judge. Wiborg v. United States, 163 U. S. 632, 658, 41 L. ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197. We do not think that the discretion was abused in the present case.
>
> "There is nothing in the record which justifies a reversal of the case, and the judgment of the circuit court of appeals is affirmed."

Appellant claims that the court erred in admitting certain exhibits produced by witness Pines, a collector for the sheriff's office, in order to show the record of alleged payments by certain defendants to Pines for the sheriff's office. Pines testified in regard to the exhibits which consisted of white and yellow slips, that the white slips were statements made under his supervision and direction for moneys collected from illegal enterprises, and that the yellow slips were his original statements made by himself; that copies of the yellow slips were furnished to defendant Staebler of the sheriff's office. The witness testified that he had kept records of receipts, that defendant Staebler of the sheriff's office wanted such records kept, that he furnished three copies of them, one for appellant Wilcox, one for Staebler and one for McGrath, the under-sheriff, who turned State's evidence. Pines stated that the yellow slips were his original records. No objection apparently was made to the introduction of these exhibits. Even if the claim of error had any merit whatsoever, no objection having been made, it need not be discussed any further.

Appellant Wilcox further claims that although he waived examination before the examining magistrate, the latter nevertheless forced him to an examination in violation of his constitutional rights; that the examining magistrate may not conduct such examination after waiver thereof by the accused. We do not need to discuss whether there would have been any merit to such objection under the former law (Sec. 15666, 3 Comp. Laws 1915). The new criminal code, 3. Comp. Laws 1929, Sec. 17193 (Stat. Ann. Sec. 28.919) distinctly provided that the State and accused shall be entitled to prompt examination and determination by the examining magistrate in all criminal cases, etc. The State may be very much interested in determining whether or not there is sufficient probable cause to hold a respondent for trial,

or it may desire to perpetuate the testimony in the event that a witness shall disappear or die before the trial. The rule is well expressed in Van Buren v. United States, 76 Fed. 77, 82, from which we quote the following excerpt:

> "The arrested party, sometimes when not guilty, in order to divert suspicion from others, but more frequently when guilty, and in order to aid the escape of confederates in the crime, is quite willing by waiving examination to suppress present inquiry; and oftener still, perhaps, this is done by the accused in the hope of suppressing the evidence against himself, or of gaining some like advantage from delay. An immediate development of the evidence and testimony is sometimes essential to the ends of justice, and it would be strange indeed if the laws are so framed, or the courts disposed so to interpret them as to deny the government this important power. Its exercise, unless wantonly abused, as almost any power may be abused, can harm no one."

Also see State, ex rel Attorney-General v. Judge, 104 La. 237; State v. Pigg, 80 Kan. 481 (103 Pac. 121); State v. Hoben, 36 Utah 186; Lyon v. State, Okla. (28 Pac. (2d) 598).

It would be somewhat ununsual if on a trial lasting over three months and in which a record of over two thousand pages is presented to us some slight errors might not have crept in. We have examined the other claims of error made by appellant and, even if there is any merit to them, they could not have affected the result or resulted in a miscarriage of justice. 3 Comp. Laws 1929, Sec. 17354 (Stat. Ann. Sec. 28.1096). It is, therefore, unnecessary to discuss them.

Judgment affirmed.

EXHIBIT 2

SUPREME COURT OPINION

on People vs. Eddie Way

STATE OF MICHIGAN—SUPREME COURT

The People of the State of Michigan,
Plaintiff and Appellee,
v.
Duncan C. McCrea, Thomas C. Wilcox, Carl Staebler, Angelo Scaduto, Eddie Way, Ben Landsberg, Louis Elliott, Clyde Stambaugh and Bertha Malone,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH, except Wiest and Boyles, JJ., Starr, J.

Eddie Way, Thomas C. Wilcox, Duncan C. McCrea, and other defendants (except Angelo Scaduto), upon jury trial, were convicted of a conspiracy to obstruct justice. Scaduto waived jury trial and was found guilty by the court.

Defendant Way was sentenced for a period of two to five years and fined $1,000. His motion and supplemental motion for a new trial were denied, and, having obtained leave, he appeals. His case comes to us on the same record presented in the separate appeals of Wilcox, McCrea, and other defendants. In this opinion we consider only the appeal of defendant Way.

Our opinions in the appeals of Wilcox, McCrea, and other defendants have determined all questions presented on this appeal adversely to defendant Way, except his claim of error by the trial court in the admission of certain testimony of witness Sam Block.

The record shows that Way was engaged in the so-called handbook business and also that he was employed to collect graft protection money from houses of prostitution, gambling places, and other illegal businesses. One Gustave Pines, who acted as collector of protection money for the benefit of defendant Wilcox (sheriff) and others, testified, in part:

> "A few days after Wilcox took office as sheriff of Wayne county I had a meeting with Carl Staebler (of the sheriff's office) and Eddie Way * * *
>
> "There was a discussion with Staebler and Way of the places to be contacted. Mr. Way was going to make the collections from the houses of prostitution and gambling houses and bring the money into the office. * * * All he gave me was a list of each place and each place was paying so much. * * *
>
> "Following this conversation between me, Staebler and Way, I received money from Eddie Way for these places. * * * Eddie Way brought in these collections from these places every month. * * *
>
> "I collected from Eddie Way * * * Rouge combination $15,162.50 from February, 1937, to February, 1938. The Rouge (River) combination paid so much money because—I don't know what they had, but Eddie Way used to come in and pay for the crap game and used to come in and pay for his slot machines and the pinballs. * * * So that there was $16,362.50 actually paid in."

On this appeal defendant Way claims error in the admission of the following testimony of witness Sam Block, who was collecting graft protection money for the benefit of defendant McCrea (prosecuting attorney) and his chief investigator, defendant Harry Colburn. Block testified, in part:

"I do not know Eddie Way very well. I know him when I see him. I had one or two business dealings with him during this period of time we are discussing. I had a discussion with Eddie Way about his business. I don't remember when. I told him I understood he operated a handbook and that he would have to take care of me. He didn't like it very well, but he took care of me. I believe I told him how much it was going to cost. Off hand, I don't remember how much. It didn't last very long. Eddie Way paid me money for the privilege of running a handbook in Ecorse probably three or four months. I do not recall what year that was in. It was some time between the time that I started collecting and the time I stopped collecting. It was usually sent out to my place. He never paid me in person."

Way's counsel moved that Block's above-quoted testimony be stricken "as being purely hearsay." Such motion was denied and the testimony allowed to stand. In his brief and statement of questions involved Way does not raise the question as to Block's testimony being inadmissible as hearsay. He now contends, as stated in his brief:

"That the court should have instructed the jury to disregard such testimony (by Block) concerning Eddie Way, in view of the fact that such testimony was patently contradictory and without merit."

Such claim that Block's testimony was "contradictory and without merit" goes to the credibility of the witness and the weight to be given his testimony. The trial court satisfactorily disposed of such contention by instructing the jury, in part, as follows:

"You are the sole judges of the credibility of witnesses. It is for you, and you alone, to say what

> weight and credence shall be given to the testimony of any witness who has testified in this case. In measuring and weighing the testimony of any witness you have a right to take into consideration his or her appearance on the stand; * * * his or her knowledge or want of knowledge of the matter concerning which he or she has testified."

The testimony of Gustave Pines and of other witnesses conclusively established defendant Way's connection with the alleged conspiracy to obstruct justice.

We are convinced that in this conspiracy case the admission of the testimony of witness Block did not constitute reversible error. There was no miscarriage of justice. 3 Comp. Laws 1929, Sec. 15518 (Stat. Ann. Sec. 27.2618).

The conviction and judgment are affirmed.

EXHIBIT 3

SUPREME COURT OPINION

on People v. Clyde Stambaugh, Lewis Elliott and Ben Landsberg

STATE OF MICHIGAN—SUPREME COURT

The People of the State of Michigan,
Plaintiff and Appellee,
v.
Clyde Stambaugh, Lewis Elliott and Ben Landsberg,
Defendants and Appellants.

BEFORE THE ENTIRE BENCH, except Wiest, J., and Boyles, J., North, J.

These three defendants were tried by jury together with other defendants, including Thomas C. Wilcox, Duncan C. McCrea, and Angelo Scaduto, and convicted of being parties to a conspiracy to obstruct justice. Stambaugh, Elliott and Landsberg were convicted and sentenced. Leave having been granted, they have appealed.

All of the numerous deefndants who have appealed are before this court on one record, and these three defendants have submitted their appeals by the same counsel and on the same briefs as were filed in behalf of Wilcox and several other defendants. Extended opinions in the separate appeals of McCrea, Wilcox, and Scaduto have been filed. No question materially affecting decision has been raised by either Stambaugh, Elliott or Landsberg which has not been considered and disposed of adversely to appellants in the above noted opinions. And further the factual aspect of the prosecution insofar as essential to the present

appeals of these three defendants appear in the opinions already filed, except it may be here noted that Stambaugh, Elliott and Landsberg operated places where gambling was permitted and for a certain period Elliott collected protection money for both Prosecuting Attorney McCrea and Sheriff Wilcox.

The most serious ground of complaint urged by these appellants is that in view of the use the special prosecutor was permitted by the trial court to make of testimony given by certain witnesses in the grand jury proceeding which led to the trial of these deefndants, it was error to deny to defendants' counsel access to and use of the transcript of the remaining portions of the testimony of such witnesses given in the grand jury proceeding. Appellants' counsel assert such access was essential to enable them to complete a full and fair examination of the witnesses who were examined by the special prosecutor with reference to their grand jury testimony.

I think the request of appellants' counsel might well have been granted, but in the instant case the trial court's ruling should not be held to constitute reversible error for the reason, as noted in the opinion of Mr. Justice Starr in McCrea's appeal, another method to accomplish the desired result was available to appellants' counsel; but more particularly the convictions should be affirmed for the reason that in the instant prosecution the testimony is so overwhelmingly conclusive of the guilt of the respective appellants that reversal on the ground under consideration would be a travesty upon justice; and further except we were to indulge in mere speculation we could not say from the record before us that the ruling of the trial judge was prejudicial to appellants.

Conviction and judgment of each of these appellants are affirmed.

EXHIBIT 4

STAY OF PROCEEDINGS

The People of the State of Michigan, Plaintiff, v. Thomas C. Wilcox, Bertha Malone, Carl Staebler, Clyde Stambaugh, Lewis Elliott, Ben Landsberg, and Eddie Way, Defendants.	41723, 41724, 41725, 41726, 41727, 41728, 41729

At a session of the Supreme Court of the state of Michigan, held at the Supreme Court Room, in the Capitol, in the city of Lansing, on the fourth day of January, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Emerson R. Boyles, chief justice; Bert D. Chandler, Walter H. North, Raymond W. Starr, Howard Wiest, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, associate justices.

In this cause defendants having filed a petition for stay of execution and release on bail pending their application to the Supreme Court of the United States to review the judgment of this Court affirming the judgment and sentence of the Circuit Court for the County of Wayne, and due consideration thereof having been had by the Court, it is ordered that the prayer of said petition be granted, and that the judgment and decision of this Court be and the same is hereby stayed for a period of thirty days, and in the meantime defendants be and they are hereby continued at liberty on the bail heretofore filed in this cause upon con-

dition however that defendants shall within the period of time herein mentioned duly prepare and file their application to the Supreme Court of the United States for the issuance of a writ of certiorari to review the aforesaid judgment and decision of this Court.

State of Michigan—ss.

I, Jay Mertz, clerk of the Supreme Court of the state of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 5th day of January, in the year of our Lord one thousand nine hundred and forty-three.

Jay Mertz,
Clerk.

(Seal)

EXHIBIT 5

FURTHER STAY OF PROCEEDINGS

The People of the State of Michigan, Plaintiff, v. Thomas C. Wilcox, Bertha Malone, Carl Staebler, Clyde Stambaugh, Lewis Elliott, Ben Landsberg, and Eddie Way, Defendants.	41723, 41724, 41725, 41726, 41727, 41728, 41729

At a session of the Supreme Court of the state of Michigan, held at the Supreme Court Room, in the Capitol, in the city of Lansing, on the twenty-ninth day of January, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Emerson R. Boyles, chief justice; Bert D. Chandler, Walter H. North, Raymond W. Starr, Howard Wiest, Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, associate justices.

In this cause a motion is filed by defendants for an order continuing the order heretofore issued herein on January 4, 1943, staying execution, in effect, and nothing in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, it is ordered that the order heretofore entered herein on January 4, 1943, staying execution, be and the same is hereby continued in full force and effect for a period of fifteen days from and after February 3, 1943.

State of Michigan—ss.

I, Jay Mertz, clerk of the Supreme Court of the state of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I here hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of January, in the year of our Lord one thousand nine hundred and forty-three.

Jay Mertz,
Clerk.

(Seal)

(33)

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 651, and No. 738 - No. 742

DUNCAN C. McCREA,
THOMAS C. WILCOX, *et al.*,
Petitioners,

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

BRIEF OPPOSING PETITIONS FOR WRITS OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 651, and No. 738 - No. 742

DUNCAN C. McCREA,
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Petitioners,

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

BRIEF OPPOSING PETITIONS FOR WRITS OF CERTIORARI

I

Opinions Below.

The opinions of the Supreme Court of the State of Michigan are officially reported as follows:

No. 651. People v. McCrea, 303 Mich. 213, 6 N.W. 2d 489,

No. 738—No. 742.
People v. Wilcox, 303 Mich. 287, 6 N.W. 2d 518,
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People v. Stambaugh,
Elliott, and Landsberg, 303 Mich. 300, 6 N.W. 2d 522.

The opinion of the Supreme Court in the case of Bertha Malone, for whom a petition is about to be or has been filed is reported as

People v. Malone, 303 Mich. 297, 6 N.W. 2d 521.

II

Counter-Statement of Matters Involved.[*]

The following is deemed necessary to correct certain inaccuracies and omissions in the statements of counsel representing the respective petitioners for certiorari (Supreme Court Rule 27, par. 4).

It appears from the petitions that the information (28) which instituted the prosecution of this case was based upon a magistrate's finding of probable cause disclosed by the testimony taken by him on a statutory 'preliminary examination' in respect of criminal charges set forth in warrants that he issued as such magistrate after conducting a 'one-man grand jury' investigation of suspected offenses pursuant to the authority vested in him by the 'Michigan Code of Criminal Procedure',[1]

Act No. 175, Chap. VII, §§ 3-6, Pub. Acts 1927 (3 Comp. Laws Mich. 1929, §§ 17217-17220 [Stat. Ann. §§ 28.943-28.946]).

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[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed record.

[1] This 'code' is merely a convenient reënactment of cognate laws thereby repealed and as such evinces no departure from Michigan's status as a common-law State.

Explaining Michigan's one-man grand jury, so-called.

For a clear understanding of the Michigan 'one-man grand jury', upon which counsel have cast so many aspersions, we deem it essential to review the procedure ordained by the legislature of that State for judicial investigations of complaints involving criminal offenses, the apprehension of accused persons, the 'preliminary examination' conducted by magistrates, and further proceedings before trial.

It is important to observe that, although the phrase recurs throughout the record, the term 'one-man grand jury' is not found in any statute, and that the magistrate who conducts the investigation possesses few of the traditional powers of the historic grand jury.

—Abolishment of traditional grand jury.

The State Constitution of 1835 (article 1, § 11) provided that no person should be held for a 'criminal offense unless on the presentment or indictment of a "grand jury",' and that the Constitution of 1850 (article 6, § 28) as well as our present fundamental law, ratified in 1909 (article 2, § 19) omitted this requirement and substituted therefor the 'right to be informed of the nature of the accusation'.[2]

---

[2]

The Constitution of Michigan does not guarantee that an accused person shall have the right to a preliminary examination, though such a privilege is accorded by statute.

—Ordinary course of procedure before trial.

The Michigan statute charts a course of procedure for magistrates (in ordinary circumstances) when investigating complaints of criminal offenses, issuing warrants thereon, conducting 'preliminary examinations', and, when probable cause is shown, binding over for trial the person accused of offenses not cognizable by a justice of the peace,

> Act No. 175 ('Code of Criminal Procedure'), Chap. VI, §§ 1-5, 11-13 and 15, Pub. Acts 1927 (3 Comp. Laws Mich. 1929, §§ 17193-17197, 17203-17205, and 17207 [Stat. Ann. §§ 28.919-28.923, 28.929-28.931 and 28.933]).

This chapter of the code provides in substance that whenever any complaint shall be made to any 'magistrate',[3] that such an offense has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him (§ 2).

Upon sufficient showing of the commission of such a crime, the magistrate is authorized to issue his warrant to bring the accused before him 'to be dealt with according to law' (§ 3), and, when the accused person appears, the magistrate is required to set a date for a 'preliminary examination' to be conducted by him (§ 4).

Should it appear from the testimony taken at the examination, that the offense charged in the warrant has been committed and that 'there is probable cause to be-

---

[3]

Such magistrates include the several circuit judges.—Act No. 175, Chap. IV, § 1, Pub. Acts 1927 (3 Comp. Laws Mich. 1929, § 17135 [Stat. Ann. § 28.860]).

lieve the prisoner guilty thereof' (§ 5), 'said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial' (§ 13). The magistrate is required to make a prompt return of his findings to the trial court (§ 15), accompanied by a transcript of the testimony taken at the examination (§ 11).

Under the decisions of the supreme court of the State, the magistrate's finding of probable cause to hold to trial, is not conclusive and, upon the respondent's motion to quash the information, and on review of the transcript of the testimony taken during the preliminary examination, the trial court is authorized and required to reverse the order of the magistrate and discharge the prisoner.[4]

Such sections of Chapter VI of the Michigan code of criminal procedure as are pertinent to the matters involved, appear in **Appendix 'B'**, *post*, p. 39.

—'Special Grand Juries'

While the State Constitution of 1850 (article 6, § 28) abandoned the traditional grand jury system, and the present Constitution failed to revive it (article 2, § 19), and although Chapter VII, § 7, of the 1927 code of criminal procedure reënacted a statute forbidding the drawing of such grand juries (Act No. 138, Pub. Acts 1859), this chapter expressly authorizes the calling of special

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[4]

People v. Rice, 206 Mich. 644,
People v. McDonald, 233 Mich. 98
People v. Licavoli, 256 Mich. 229,
People v. Hallas, 257 Mich. 127,
People v. Hirschfield, 271 Mich. 20,
People v. Wilkin & Walsh, 276 Mich. 679, 688.

grand juries composed of 16 members, whenever 'the judge (of any court) shall so direct in writing under his hand' (§ 7), and it retains for this purpose certain vestigial provisions governing their organization and proceedings (§§ 8-19).[5]

—Magisterial investigation of suspected offenses.

That part of Chapter VII which authorized the investigation conducted by the circuit judge in this cause (§§ 3-6) was a reënactment of a statute (Act No. 196, Pub. Acts 1917 as amended) enlarging the powers of magistrates to investigate complaints and issue warrants, and it adopts the framework of Chapter VI, §§ 2-4, of the code heretofore referred to.

The key that opens the door to the exertion of such judicial power is found in section three (3) of the chapter:

> "**Sec. 3.** Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to

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[5] This accounts in part at least for several anachronisms in the chapter.

attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings" (3 Comp. Laws Mich. 1929, § 17217 [Stat. Ann. § 28.943]).

If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, 'he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge *shall proceed with the case . . . . in like manner as upon formal complaint'*. Also, if so satisfied, he shall report the matter to the proper officials to the end that any public officer so accused may be removed from office. So far as secrecy is concerned those participating in the inquiry 'shall be governed by the provisions of law relative to grand juries' (§ 4).

Section six (6) of this chapter provides protection under the state constitutional mandate that 'no person shall be compelled in any criminal case to be a witness against himself' (article 2, § 16):

"**Sec. 6.** No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such

questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him'' (3 Comp. Laws Mich. 1929, § 17220 [Stat. Ann. § 28.946]).

Such sections of Chapter VII, supra, as are considered pertinent to the matters involved, appear in **Appendix 'C'**, *post*, p. 44.

No. 651. Duncan C. McCrea.

We correct the following inaccuracies and omissions in the statement of this petitioner.[6]

It may be observed that the court below held 'there was ample testimony from which the jury could reasonably find McCrea guilty, beyond a reasonable doubt, of the conspiracy as charged' (2077-2089, 2089), that they were satisfied 'the testimony discussed above (2077-2093), if believed, clearly established a single conspiracy' (2093), and that they expressly referred (2097) to their comment in a companion case, People v. Stambaugh, 303 Mich. 300, 302, 6 N.W. 2d 522, 533, that

> ''the convictions should be affirmed for the reason that in the instant prosecution the testimony is so overwhelmingly conclusive of the guilt of the respec-

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[6] Much that is said in this subdivision of the brief applies with equal force to the other petitioners.

tive appellants that reversal on the ground under consideration would be a travesty on justice".

First ('Point 1'): On page two [2] of the petition it is alleged that

> "the petitioner (Point 1) was not permitted on cross-examination to lay a foundation for impeachment of witnesses, including defendants who had been granted immunity, by asking them whether they had testified differently before the one-man grand jury".

We add, as observed by the court below (2096-2097), that the Michigan code of criminal procedure (Chapter VII, § 19) makes ample provision for such impeachment by permitting the magistrate or the stenographer to be called as a witness for the purpose of testifying whether the testimony of a witness examined by him is inconsistent with, or different from the evidence given by such witness before the trial court.[7]

The record also discloses that the attention of the respondents was directed to this privilege (343), and that they neglected to exercise it (361-362).

Second ('Point 2'): On page two [2], petitioner broadly asserts that he

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[7]

Chapter VII, § 4, of the code by reference applies the following to a magistrate who investigates suspected offenses under §§ 3-6 thereof:

"Sec. 19. Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such a jury is consistent with, or different from the evidence given by such witness before such court".

> "*was forced* by the one-man grand jury to claim his State privilege against self-incrimination (State Constitution, article 2, § 16) in refusing to testify as to certain incidents which would be developed at the trial, but was penalized for claiming the privilege when the government attorney was permitted to show to the petit jury that petitioner had stood on his constitutional rights and refused to answer".

The record does not support the statement that petitioner '*was forced*' to claim his privilege, unless this Court is inclined to accept his naked testimony that he made such answers 'at the judge's insistence and for that reason only' (1707), for it appears that after this testimony was given, and probably reiterated, the special prosecutor tendered to McCrea the entire grand jury testimony, challenging him to point out wherein he had been '*forced*' to take the position he did before the 'one-man grand jury' (1740-1742), and that he refused or neglected to take advantage of the privilege (1810-1811).[8]

Third ('Point 3'): Petitioner alleges (p. 2) that he

> "was seriously prejudiced by the government in that the prosecution failed to indorse the names of *res gestae* witnesses on the information at the time of filing, although the state statute made this mandatory".

The statute to which reference is had permits addi-

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[8]

We will contend, of course, that it would require far more than this evidence to establish the fact that the magistrate 'forced' a witness to claim his constitutional privilege and thereby falsify his testimony.

tional names to be endorsed on the information by leave of court.[9]

On the 20th day of February, 1941, after the trial had been in progress over one week, petitioner filed a written motion to quash the information (73-74) for failure to indorse the names of witnesses then named for the first time. He claimed, without supporting affidavits, that the names were known to the prosecuting attorney when he filed the information. When the court heard this motion and expressed a desire to have such parties added to the information as might be *res gestae* witnesses, the prosecution raised no objection to the indorsement of any of the witnesses named in the motion, and counsel for the other defendants consented thereto, but petitioner insisted that the information be quashed, and thereupon the names were indorsed (413-415). Petitioner claimed no surprise, and requested no adjournment; rather he chose to stand on his technical 'rights'.

Fourth ('Point 4'): Petitioner next alleges that he was compelled to proceed with a jury which was illegally drawn from a list of jurors of registered voters, but excluded electors who were not registered voters, but who had the qualifications of jurors, although the State statute in no way contemplated the exclusion of electors who were not registered voters.

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[9]

The statute provides:

"Sec. 40. All informations shall be filed . . . . by the prosecuting attorney of the county as informant; he shall . . . . indorse thereon the names of the witnesses *known to him at the time of filing the same. Names of other witnesses may be endorsed before or during the trial by leave of the court and upon such conditions as the court shall determine*". Act No. 175, Chap. VII, § 40, Pub. Acts 1927 (3 Comp. Laws 1929, § 17254 [Stat. Ann. § 28.980]).

Petitioner, it should be observed, filed a written challenge to the array when the jury box was first filled (75), the basis of which was that the list of jurors furnished for the trial was not taken from all the qualified electors of Wayne county, in that the names were selected from a list of registered voters, thereby excluding unregistered voters who had the qualifications of jurors; it being claimed that this exclusion was arbitrarily made.

The affidavit attached to this motion (78-80) states that McCrea had been the legal advisor for the Wayne county board of jury commissioners for upwards of six [6] years, 'and is familiar with their methods and procedure for selecting jurors and of the facts herein stated'.

No further showing, either by oral testimony or affidavit, was made, and the affidavit which accompanied the motion alleged no facts. Just before the jury was sworn, the trial judge denied the challenge. Meanwhile, jury panels from A to E had been exhausted and an additional panel had been furnished from which the jury had been drawn, and all parties save McCrea had announced themselves as satisfied (77).

Further action was not taken until petitioner had been adjudged guilty by the jury and sentenced (1987). On that day he had filed a motion for new trial and subsequently, on May 20, 1941, he filed a supplemental motion for new trial and amendments to his motion challenging the array (2029). An amendment to this supplemental motion was filed by him on June 14, 1941 (2035), both of which were denied (2041). He then filed a second supplemental motion (2042), which was denied (2047); and then filed a third supplemental motion (2048) which was likewise denied (2050).

Fifth ('Point 5'): It is alleged that petitioner 'was seriously prejudiced in that the jury, in its deliberation, was permitted to have in the jury room three volumes of the transcript of testimony without the knowledge of the court or defense counsel and certain exhibits with the approval of the court but without the knowledge or consent of defense counsel' (p. 3).

The record shows that while the jury was deliberating an officer of the court, without instructions from the trial judge, committed the blunder of handing three volumes of the unauthenticated transcript of the testimony to the foreman of the jury. Between five [5] and ten [10] minutes later these volumes were retrieved and the officer was reprimanded by the court (1900-1903, 1915, 1916).

Thereupon certain testimony was taken from the court reporters to show the authenticity of the transcript which had been in possession of the jury for a few minutes (1892-1896). This was in the presence of the jury (1895).

Sixth ('Point 6'): The final contention is that petitioner

> "was named a defendant in four warrants . . . wherein the one-man grand jury was the complaining witness, prosecuted on the second of these warrants, brought before the same one-man grand jury sitting as a preliminary hearing magistrate, and probable cause found notwithstanding that the one-man grand jury had prejudged the question of probable cause when he filed the warrant as complaining witness".

The foregoing statement has few shreds of truth supported by the record, and it is quite evident that peti-

tioner, who is well acquainted with Michigan criminal procedure, has deliberately misled his own counsel into error.

The magistrate issued the warrants after due investigation under statutory authority, not as a 'complaining witness', and, as the Supreme Court correctly observed,

> "the record contains no affidavit substantiating McCrea's charge of prejudice and bias on the part of the examining magistrate. Our attention has not been called to any act or conduct on the part of Judge Ferguson, while conducting the preliminary examination, from which prejudice or bias could be inferred" (2099).

It is our position that the Michigan code of criminal procedure expressly authorizes an investigation magistrate to conduct the preliminary examination,

> Act No. 175, Chap. VII, §§ 3-6, Pub. Acts 1927 (3 Comp. Laws 1929, §§ 17217-17220 [Stat. Ann. §§ 28.943-28.946]).

Moreover, petitioner failed to include in the record, or produce, the transcript of the testimony taken before the examining magistrate, and he thus deprived himself of the right to judicial review thereof on motion to quash the information on the ground of lack of probable cause (2097-2098).

No. ——. Bertha Malone.

The clerk of the Court informs us that Bertha Malone, one of the defendants convicted of conspiracy in this

cause, intends to file (unless she has already done so) a petition for certiorari.

In the court below, this respondent was represented by the same counsel who appeared for Thomas C. Wilcox et al. (No. 738–No. 742), and in deciding her case on appeal the Supreme Court said:

> "She is before the court on the same record as the other defendants and she joins in the brief of defendants Wilcox, Elliott, Lansberg and others. As she does not raise any questions not considered in the opinion rendered herewith in the cases of Wilcox, Elliott and Lansberg, those decisions control our determination in the instant case".
>
> *People v. Malone,* 303 Mich. 297, 6 N.W. 2d 521.

Since what we have to say concerning No. 738–No. 742, would undoubtedly apply with equal force to her case, we are willing to waive the filing of a separate brief in the case of Malone, to avoid further delay.

No. 738—No. 742. Thomas C. Wilcox et al.

Since these petitioners raise questions similar to those involved in No. 651 (Points 1, 4, 5, and 6), we follow the order of the McCrea petition in correcting inaccuracies and omissions in their joint statements.

First (McCrea's 'Point 1'—Wilcox 'Question 7'): The point that petitioners were limited in their cross-examination of witnesses by denial of use of the 'grand jury' testimony for purposes of impeachment is first mentioned in their summary of claims for the writ (p. 11),

unsupported by record page citation, and is not referred to elsewhere in the petition. Nor is it mentioned in the statement of facts found in their brief (pp. 14-15).

It should be observed, in this connection, that during the trial counsel who represented these petitioners stated that he might want to call Judge Ferguson (the magistrate who conducted the 'one-man grand jury' investigation) 'as a witness here' and was informed he had that privilege (343).

Second (McCrea's 'Point 4',—Wilcox 'Question 1'): The present claim that the jury which decided petitioners' case 'was illegally drawn' in violation of the laws of the State of Michigan, was first raised below on a supplemental motion for new trial (2013-2017), without testimony or supporting affidavits.

Petitioners mention no challenge to the array prior to trial or at the time the jury was empanelled, and the record fails to disclose such a procedure.

Third (McCrea's 'Point 5'—Wilcox 'Question 2'): Counsel for petitioners, as did counsel for McCrea, complains of the incident which occurred after the jury had started their deliberations, but he barely mentions it in his petition and few details are supplied. Record citations are absent, with one exception (1890).

Fourth (McCrea's 'Point 6', Wilcox 'Question 3'): It is claimed that the magistrate who conducted the 'one-man grand jury' investigation was incompetent to conduct the preliminary examination, and the question appears to have been raised on a motion to quash (59-60). Error is also based on the further contention that peti-

tioners were not given opportunity to examine the witnesses at such examination (612), but these are the only record page citations. As in the case of McCrea, the transcript of the testimony taken at the examination is not printed in the record.

Fifth (Wilcox 'Question 4'): Counsel avers in the petition that 'your petitioners were not permitted to be confronted by the witnesses against them', but he cites no record page. Such record pages as are cited in the brief (88, 89, 105) afford only a hazy idea as to what occurred.

Sixth (Wilcox 'Question 5'): The inconsistent claim is made that petitioners were not permitted to waive the preliminary examination, but again, as in the question that Judge Ferguson was disqualified to act as examining magistrate, there is no record of such proceedings. And petitioners cite the wrong statute,

> *Compare* Act No. 175, Chap. VII, § 42, Pub. Acts 1927 (3 Comp. Laws 1929, § 17256 [Stat. Ann. § 28.982]), cited by petitioners, and § 1 of Chapter VI of the same act (3 Comp. Laws 1929, § 17193 [Stat. Ann. § 28.919]).

Seventh (Wilcox 'Question 6'): It is said that petitioners were forced to permit testimony against them of similar offenses by parties who were not named in the conspiracy (information) either as defendants or co-conspirators, but, as in other instances, there are insufficient record page citations (274, 275, 305) to apprise the court of the effect of such testimony upon these particular petitioners.

III

Basis of Jurisdiction.

We take the position there are no valid bases for jurisdiction in any of these cases and, with this in view, we correct certain inaccuracies and omissions in the statements of the other parties.

No. 651. Duncan C. McCrea.

1st ('Point 1'): It is said 'petitioner objected to the limitation of cross-examination (242, 361-362, 479) as being a deprivation of Federal due process, error was assigned on this ground (10), and that the Supreme Court of Michigan considered the Federal question (2093) and overruled it' (Petition, p. 4).

While the court below held McCrea 'was not denied due process' (2097), this dictum was not essential to their decision which was controlled mainly by local considerations (2093-2097). Moreover, it cannot be said that in the trial court petitioner clearly objected on Federal grounds to the alleged limitation on cross-examination (242, 338, 349, 361, 362, 363, 364, 479, 482, 955, 973, 1329, 1330), and his motion for mistrial does not appear to have been made on the theory that such a limitation deprived him of due process, nor did he raise this Federal question on motion for new trial (2029, 2035, 2042, 2048) or by assignments of error (10, 11).

2nd ('Point 2'): Counsel is mistaken in saying that petitioner asserted that 'requiring him to answer denied him Federal due process (1698)', that he asked for a mistrial (1702, 1738-1740), moved to strike (1808), and

assigned error (3, 12, 13) *'all on the Federal ground'* (Petition, p. 4).

While counsel who represented petitioner during the latter's cross-examination, referred rather vaguely to the Constitution of the United States (1698), he never 'specially set up or claimed . . any title, right, privilege or immunity . . under the Constitution' (Judicial Code, § 237 as amended [28 FCA § 344, 28 USCA §344]) when he objected (1698) or when he moved for a mistrial (1738-1740). On the occasion of his motion to strike the testimony (1808-1810), petitioner relied solely on the Fifth Amendment (1808) and article 2, § 16, of the State Constitution (1809), but he made no special claim that he was being denied Federal due process. And he assigned no error on this specific ground (3, 12, 13).

3rd ('Point 3'): Although petitioner objected to the failure of the prosecutor to indorse the names of certain *res gestae* witnesses, and moved to quash the information on that ground (73, 93), he did not specially set up or claim any 'right, privilege or immunity . . under the Constitution', nor did he assign specific error on that theory (3).

4th ('Point 4'): While in his challenge to the array of jurors (79) petitioner claimed a denial of Federal due process, and raised the point in his supplemental motion for new trial (2032), and although the Supreme Court held he had not been denied this privilege (2129), the question was decided on other controlling grounds, specifically, that petitioner had failed to make a sufficient showing that the jury panel had been drawn contrary to Michigan law, and that his challenge to the array on

supplemental motion for new trial, came too late under established state practice (2127-2131).

5th ('Point 5'): In stating the 'basis of jurisdiction' to consider the question involving the three volumes of testimony, and certain exhibits, sent to the jury for their consideration (1900, 1906, 1907, 2111-2119), counsel fails to assert that petitioner moved for a mistrial (1906) or raised any objection on the ground that he was being denied any rights under the Fourteenth Amendment. As a matter of fact, no such objections were made and no error was assigned on Federal grounds (9). This was purely a local question.

6th ('Point 6'): In his motion to quash the information (68), because the examining magistrate was disqualified (69-73), petitioner did claim that he had been denied the equal protection of the law and due process of law under the 14th Amendment. But in the Supreme Court this question was decided on the ground the magistrate was expressly authorized by local law to conduct such an examination, and that petitioner had failed to establish prejudice. The decision was not controlled by the dictum that '*furthermore*, the law is well settled that the due process clauses of the Federal and State Constitutions do not require a preliminary examination in criminal proceedings (citing authorities)'.

No. 738—No. 742. Thomas C. Wilcox et al.

It may be said, in general, that none of these petitioners raised these Federal questions in the trial court.

First (McCrea 'Point 1',—Wilcox 'Question 7'): The present claim that petitioners were unduly limited in their cross-examination of witnesses, because they were

barred from using the transcript of grand jury testimony for purposes of impeachment, is not raised in their 'Statement of Jurisdiction' nor does it appear in the 'Statement of Facts'. No special claim of Federal rights, privileges or immunities was made when the question arose in the trial court (242, 361-364, 479), and no error was assigned on that ground (13-17).

Second (McCrea's 'Point 4',—Wilcox 'Question 1'): When petitioners, for the first time, challenged the array of jurors in a supplemental motion for new trial (2013-2017), they claimed a denial of Federal due process and equal protection, but the Supreme Court, by adoption of their opinion in the case of McCrea (2169, 2181, 2189, 2196, 2203), decided this question on the controlling ground that petitioners had failed to make sufficient showing that the jury panel had been illegally drawn, and that the challenge to the array came too late on supplemental motions for new trial, under an established state practice (2127-2131).

Third (McCrea's 'Point 5',—Wilcox 'Question 2'): Counsel cites one page of the record (1890) in support of his contention that error supervened when the court officer committed a blunder in handing to the jury certain volumes of the testimony. It does not appear therefrom that any Federal constitutional question was raised at any point of the procedure, and petitioners did not assign error on the ground of denial of due process (13-17).

Fourth (McCrea's 'Point 6',—Wilcox 'Question 3'): In petitioners' motion to quash (59) it is said that 'the examining magistrate forced this defendant into the examination of this cause in violation of his constitutional rights', but the 14th Amendment is not mentioned, and no error is assigned on Federal grounds (13-17).

Fifth (Wilcox 'Question 4'): Petitioners now claim that, in the testimony of William Dowling (88, 89, 105), they were not permitted to be confronted by certain witnesses, but the record (88, 89, 105) discloses that petitioners' objection to such testimony was based on the sole ground that it was irrelevant (88, 89) and possessed no probative value (105). The Federal question was not raised in the assignments of error (13-17).

Sixth (Wilcox 'Question 5'): While the present claim that these petitioners were not permitted to waive preliminary examination was raised on motions to quash (59-63) based on the ground that this was 'in violation of his constitutional rights' (59), no error is assigned on that theory (13-17), and the decision of the Supreme Court (2174) rests entirely on the provisions of a local statute giving the State, as well as respondents to a criminal accusation, the right to an examination (Chapter VI, § 1, Code of Criminal Procedure, *ante*).

Seventh (Wilcox 'Question 6'): Petitioners' objections to the admission of testimony (274, 275, 305) which they now contend permitted consideration of other offenses by parties who were not named in the conspiracy, were based solely on the ground of irrelevancy, nor was error assigned on the ground that such testimony violated any right or privilege guaranteed by the Federal Constitution (13-17).

IV

ARGUMENT

Introduction

This criminal case, as we view it, is one of many where a state supreme court after careful review finds 'overwhelming' evidence of guilt and concludes there is no reversible error. It is an instance in which claims of constitutional infringement are exaggerated out of all proportion to incidents that did not permeate the trial.

Since a strong presumption of fairness and impartiality accompanies a sovereign State to the threshold of this Court, and since petitioners have been convicted of flagrant violations of the public's trust in the administration of their high offices, they should not be granted certiorari on the basis of merely technical claims involving the Constitution of the United States, or in absence of a clear showing that their fundamental rights have been violated.

While on occasion defense counsel referred somewhat vaguely to 'constitutional rights' and in a few instances expressly invoked the Fourteenth Amendment, with these exceptions they did not 'specially set up or claim . . . any title, right, privilege or immunity . . under the Constitution' (Judicial Code, § 237 [28 FCA, USCA § 344]).

Furthermore, the majority if not all of the questions now presented in a constitutional aspect were decided by the court below as domestic issues largely controlled by state statutes the validity of which is not challenged.

The rule is well-established that, unless errors result

in injustice, or in the deprivation of life or liberty by a denial of fundamental and essential rights,

Clyatt v. United States, 197 U. S. 207,
Weems v. United States, 217 U. S. 349,
Kansas City Ry. Co. v. Guardian Trust Co., 240 U. S. 166,
United States v. Atkinson, 297 U. S. 157,

or the rights involved are such that 'neither liberty nor justice would exist if they were sacrificed',

Palko v. Connecticut, 302 U. S. 319,

this Court will consider only such questions as were raised and reserved in the lower courts,

3 Am. Juris., Appeal and Error, § 246,
Miller v. Texas, 153 U. S. 535,
Young v. Masci, 289 U. S. 253.

Nor will this Court reverse a decision of the highest court of any State or a federal court unless it clearly appears that substantial rights have been violated,

United States v. River Rouge Improvement Co., 269 U. S. 411,
McCandless v. United States, 298 U. S. 342,

that 'some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental' has been offended,

Powell v. Alabama, 287 U. S. 45, 67,
Snyder v. Massachusetts, 291 U. S. 97,

or that there has been a 'failure to observe that fundamental fairness essential to the very concept of justice',

Lisenba v. California, 314 U. S. 219,

or, as said in an earlier case, the Fourteenth Amendment is applicable only when there has been an 'arbitrary' deprivation of life, liberty, or property,

Ex Parte Converse, 137 U. S. 624.

"The phrase 'due process of law' does not mean that the operations of the state government shall be conducted without error or fault in any particular case or that the federal courts may substitute their judgment for that of the state or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases",

14 Am. Juris., Criminal Law, § 122, citing
Frank v. Mangum, 237 U. S. 309.

And it requires little support of authority to establish the well-known principle that this court will acquiesce in the construction given by state courts to state enactments or Constitutions,

11 Am. Juris., Constitutional Law, §§ 107, 109,
Tullis v. Lake Erie & Western R. Co., 175 U. S. 348,
Hawks v. Hamill, 288 U. S. 52,
Morehead v. New York, 298 U. S. 587.

Having in mind these general principles, we now consider briefly the questions raised by petitioners.

Point One

[McCrea, 'Point 1',—Wilcox, 'Question 7']

Petitioners' contention that cross-examination was unduly limited, was overruled by the court below on the basis of a state statute which is unchallenged here, and their objections in the trial court were not predicated on Federal grounds.

It suffices to say, without repeating our statements concerning the matters involved and the basis of jurisdiction, that in disposing of petitioners' claim that the privilege of cross-examination had been unduly limited by a denial of the use of the 'grand jury' testimony for purposes of impeachment, the Supreme Court rested their decision upon a local law which provided a fair means for such impeachment, and that petitioners neglected to take advantage of the opportunity thus afforded (343). They might have called as a witness the stenographer who transcribed his notes of the 'grand jury' testimony, or the magistrate himself, but they did not do so. Moreover, as heretofore observed, petitioners' objections were not predicated on any claim of right or privilege guaranteed by the Constitution of the United States.

Point Two

[McCrea 'Point Two']

Disclosure before the petit jury of petitioner's claim of privilege before the investigating magistrate, violated no right guaranteed by the Fourteenth Amendment—and the question was not specially raised in its present aspect.

That petitioner made no special claim of violation of constitutional rights guaranteed by the Fourteenth Amendment, in respect of this matter, appears from our statement concerning the basis of jurisdiction, and this need not be repeated.

First: Article 2, § 16, of the Michigan Constitution provides that 'no person shall be compelled in any criminal case to be a witness against himself', but this privilege is not guaranteed by the Fifth Amendment to the Constitution of the United States.

> "Immunity from self-incrimination in the courts of the states is not secured by any part of the Federal Constitution—not by the Fifth Amendment, because it is restrictive of Federal action only, and not by the Fourteenth Amendment, because immunity from compulsory self-incrimination was not a part of the 'law of the land' at the time the American colonies became independent of England. Furthermore, it is not one of the fundamental rights, privileges and immunities of citizens of the United States or an element of due process of law within the meaning of the constitutional provisions",
>
> 14 Am. Juris., Criminal Law, § 146,
> *Twining v. New Jersey*, 211 U. S. 78,

Ensign v. Pennsylvania, 227 U. S. 592,
Snyder v. Massachusetts, 291 U. S. 97,
Palko v. Connecticut, 302 U. S. 319,
Cf. *Lisenba v. California,* 314 U. S. 219.

The late Mr. Justice Cardozo, speaking for the Court in the case of *Palko, supra* (p. 325), said:

> "What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey, supra.* This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the immunities and privileges protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications of liberty itself".

The rule is also well-recognized that a defendant in a criminal case who voluntarily testifies in his own behalf, as did this petitioner, waives completely his privilege under the Fifth Amendment, and, by the same token his privilege against self-incrimination under State Constitutions,

Sawyer v. United States, 202 U. S. 150,
Powers v. United States, 223 U. S. 303,

Caminetti v. United States, 242 U. S. 470,
Raffel v. United States, 271 U. S. 494.

And this Court has held that a violation of defendant's rights under a provision in a State Constitution which is identical to one in the Federal Constitution which is only obligatory on the Federal courts, does not infringe a Federal right,

Ensign v. Pennsylvania, 227 U. S. 592.

Second: When petitioner, who was prosecuting attorney of his county, was called to respond to an orderly inquiry, 'justice did not perish', and when placed on trial he chose to take the stand in his own behalf, thus subjecting himself to an orderly cross-examination to test his credibility, all privileges against 'self-incrimination' was thereby waived.

On direct-examination, McCrea testified he had discussed handbooks and other forms of gambling with one Colburn, his chief investigator (1697).

On cross-examination (1711), he was asked:

"Q. Did you ever discuss policy and mutuel games with Harry Colburn?

A. If I did, it was a legitimate discussion.

Q. You are sure of that?

A. Yes, sir, very sure.

Q. So there was nothing illegitimate about any discussions you had with Harry Colburn with reference to policy or mutuel games?

A. That is correct".

The prosecutor then proceeded to test the witness'

credibility by directing attention to the fact that when the same question was propounded during the judicial inquiry before Judge Ferguson, McCrea refused to testify on the ground that his testimony might tend to incriminate him (1711-1712).

This, we submit, was a legitimate line of cross-examination. It is quite apparent from the record that the answers which McCrea gave before the trial court would not have incriminated him had he testified to the same effect before the court of inquiry; and it became very important as bearing upon his credibility to determine why he stood upon his constitutional rights before the 'grand jury', inasmuch as the position taken there was definitely contrary to the position taken and the testimony given before the trial jury.

This was well-stated by the trial court in denying a motion to strike McCrea's cross-examination (1811-1812), and by the Supreme Court in refusing to reverse on this ground (2133).

It is inconceivable that a member of the bar, while under oath before the 'grand jury', should refuse to answer because his testimony, if given, might tend to incriminate him, unless it would. Either he falsified before the 'grand jury' or he falsified in his testimony upon the trial. Moreover, he was given ample opportunity to explain how it happened that he gave these answers before the 'grand jury', and his position was fully presented to the jury for their consideration in determining his credibility (1705-1717).

When petitioner claimed he was *'forced'* to claim his privilege, he was tendered the grand jury testimony and

given permission to examine his entire testimony for the purpose of pointing out in what manner the magistrate had *'forced'* him so to do, but he refused to exercise this privilege or avail himself of the opportunity (1740-1742, 1810).

We respectfully submit that, so far as this incident is concerned, there is no evidence that the State of Michigan has denied petitioner any fundamental right guaranteed by the Fourteenth Amendment.

Point Three

[McCrea, 'Point 3']

Failure before trial to indorse on the information the names of certain res gesta witnesses denied no constitutional rights 'specially set up or claimed'.

This point is fully covered in our statements *ante*, to which reference is prayed.

The question was presented to (3) and decided by (2119-2127) the Supreme Court of Michigan as a purely local issue controlled by a state statute, and no Federal question was raised (3, 73, 79).

Point Four

[McCrea, 'Point 4',—Wilcox, 'Question 1']

No Federal privileges or rights were violated in the drawing of the jury panel, and the question was decided on local grounds.

This point is also fully covered in our statements, and it is unnecessary to repeat what was said there.

Suffice it to observe that while the Supreme Court held petitioners had not been denied due process (2129), this was not essential to their decision that McCrea failed to prove that the jury panel had been illegally drawn, and that petitioners' challenge to the array on motion for new trial came too late under established local practice (2127-2131).

Point Five

[McCrea, 'Point 5',—Wilcox, 'Question 2']

No Federal constitutional rights were violated when without judicial knowledge or consent three volumes of testestimony were sent to the jury room, and no Federal question was raised in the court below.

The circumstances in which three volumes of the testimony found their way to the jury room and there remained for no more than ten minutes, are narrated in our statements concerning the matters involved and the basis of jurisdiction. It clearly appears therefrom that counsel for the defendants offered no objection and made no motion for a declaration of mistrial on the ground that their constitutional rights were in jeopardy, nor did they assign error for the purpose of raising such a federal question. We submit the matter should not be considered here. Moreover, it is apparent that no prejudicial error was committed, and the high court so held (2111-2119).

Point Six

[McCrea, 'Point 6',—Wilcox, 'Question 3']

The fact that the preliminary examination was conducted by the magistrate who, upon investigating suspected offenses, issued warrants, violated no Federal constitutional rights.

As heretofore observed in our statement of matters involved, the Michigan code of criminal procedure expressly authorizes any circuit judge to act as a magistrate in the investigation of criminal offenses, and, upon finding of probable cause to suspect the commission of such crimes, to issue his warrant and proceed to examination. The record shows that such an orderly procedure was followed in this case.

Counsel for the petitioner McCrea injects into this question the following accusation:

> "An inquisition was conducted wherein witnesses were interviewed in a star-chamber room in a local office building (478-9); subpoenas were served without regard to law (341-7) and on many occasions witnesses were apprehended without subpoena (1745); witnesses were held incommunicado for days (1123, 4-30); third degree methods were used (478-9); other atrocities occurred (1219-20). After thus securing 'evidence', the indictment was returned" (Brief, p. 14).

Testimony concerning such extra-judicial proceedings, none of which are directly attributable to the magistrate who conducted the inquiry, was brought out by defense counsel in cross-examining the State's witnesses and to

test their credibility. None of these facts were relied upon as the basis for a claim that the constitutional rights of the respondents had been violated. The State introduced in evidence no confessions, and there is no claim in this record that any of the defendants, or any witness, was forced, by third degree methods, to confess or to testify.

A petitioner cannot ask redress 'for any disregard of due process prior to his trial', *Lisenba v. California, supra*, and there is no suggestion that the treatment of 'grand jury witnesses' was reflected in the trial.

Moreover, as observed by the Supreme Court,

> "the record contains no affidavit substantiating McCrea's charge of prejudice and bias on the part of the examining magistrate. Our attention has not been called to any act or conduct on the part of Judge Ferguson, while conducting the preliminary examination, from which prejudice or bias could be inferred" (2099).

And, as we have pointed out, petitioners failed to include in the record any portion of the transcript of testimony taken during the preliminary examination.

V

Further Questions

We observed in our statements concerning the matters involved and the basis of jurisdiction, three other questions raised in No. 738–No. 742 (the Wilcox petition), but these are so frivolous that they require no further discussion. We rest our case on what we have said in Parts II and III of this brief.

VI

Conclusion

We respectfully submit that this case is not one which justifies the granting of a writ of certiorari.

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APPENDIX 'A'

Pertinent provisions of Michigan State Constitution: Article II,

"**Sec. 15.** Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained".

"**Sec. 16.** No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law".

"**Sec. 19.** In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defense; and in courts of record, when the trial court shall so order, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal".

APPENDIX 'B'

Pertinent provisions of 'Michigan Code of Criminal Procedure' pertaining to preliminary examinations:

Act No. 175, Chap. VI, §§ 1, 2, 3, 4, 5, 11, 12, 13 and 15, Pub. Acts 1927 [3 Comp. Laws 1929, §§ 17193, 17194, 17195, 17196, 17197, 17203, 17204, 17205, 17207 (Stat.

Ann. §§ 28.919, 28.920, 28.921, 28.922, 28.923, 28.929, 28.930, 28.931, 28.933)]:

Chapter VI

"**SECTION 1.** The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination.

"**Sec. 2.** Whenever complaint shall be made to any magistrate named in section one (1), chapter four (4), of this act, that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him.

"**Sec. 3.** If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein.

"**Sec. 4.** The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for examination not exceeding ten (10) days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such magistrate may deem pertinent.

"**Sec. 5.** If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committed to jail for trial.

"**Sec. 11.** Witnesses may be compelled to appear before such magistrate by subpoenas issued by him, or by any officer or court authorized to issue subpoenas, in the same manner and with the like effect and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials before justices of the peace; and the evidence given by the witnesses examined shall be reduced to writing by such magistrate, or under his direction and shall be signed by the witnesses respectively: Provided, That unless otherwise provided by law, the evidence so given shall be taken down in shorthand by a county stenographer where one has been appointed under the provision of any local

act of the legislature or by the board of supervisors of the county wherein such examination is held, or the magistrate for cause shown may appoint some other suitable stenographer at the request of the prosecuting attorney of said county with the consent of the respondent or his attorney to act as official stenographer pro tem for the court of such magistrate to take down in shorthand the testimony of any such examination, and any stenographer so appointed shall take the constitutional oath as such official stenographer and shall be entitled to the following fees: Six (6) dollars for each day and three (3) dollars for each half day while so employed in taking down such testimony and ten (10) cents per folio for typewriting such testimony so taken down in shorthand and the same may be allowed and paid out of the treasury of the county in which such testimony is taken: Provided further, That it shall not be necessary for a witness or witnesses whose testimony is taken in shorthand by such stenographer above provided, to sign such testimony but any witness or witnesses shall have the right to have such testimony read to them upon their request. Such testimony, after being typewritten, shall be received and filed in the court to which the accused is held for trial without the signture of such witness or witnesses for the same purpose and with like effect as the testimony of witnesses hereinabove provided, which is signed by such witness or witnesses and such testimony so taken shall be considered prima facie evidence of the testimony of such witness or witnesses at such examination.

"**Sec. 12.** After the testimony in support of the prosecution has been given, the witnesses for the

prisoner, if he have any, shall be sworn, examined and cross-examined and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution.

"**Sec. 13.** If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial.

"**Sec. 15.** All examinations and recognizances taken by any magistrate pursuant to any of the provisions of this chapter, shall be forthwith certified and returned by him to the clerk of the court before which the party charged is bound to appear, and if such magistrate shall refuse or neglect to return the same, he may be compelled forthwith by rule of the court, and in case of disobedience he may be proceeded against by attachment as for a contempt."

APPENDIX 'C'

Pertinent provisions of 'Michigan Code of Criminal Procedure' pertaining to investigation of suspected offenses and proceedings before trial:

Act No. 175, Chap. VII, §§ 1, 2, 3, 4, 6, 7, 9, 19, 40 and 42, Pub. Acts 1927 [3 Comp. Laws 1929, §§ 17215, 17216, 17217, 17218, 17220, 17221, 17223, 17233, 17254, 17256 (Stat. Ann. §§ 28.941, 28.942, 28.943, 28.944, 28.946, 28.947, 28.949, 28.959, 28.980, 28.982)]:

Chapter VII

SECTION 1. The several circuit courts of this state, the recorders' courts and any court of record having jurisdiction of criminal causes, shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon informations for crimes, misdemeanors and offenses, to issue writs and process and do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictment.

"**Sec. 2.** All provisions of the law applying to prosecutions upon indictments, to writs and process therein and the issuing and service thereof, to commitments, bail, motions, pleadings, trials, appeals and punishments, or the execution of any sentence, and to all other proceedings in cases of indictments whether in the court of original or appellate jurisdiction, shall, in the same manner and to the same extent as near as may be, be applied to informations and all prosecutions and proceedings thereon.

"**Sec. 3.** Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

"**Sec. 4.** If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or

malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. And in respect of communicating or divulging any statement made by such witnessses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

"**Sec. 6.** No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him.

"**Sec. 7.** Grand juries shall not hereafter be drawn, summoned or required to attend at the sittings of any court within this state, as provided by

law, unless the judge thereof shall so direct by writing under his hand, and filed with the clerk of said court.

"**Sec. 9.** The clerk of the court shall prepare an alphabetical list of all the persons returned as grand jurors, and when the jury is to be impaneled, the following oath shall be administered to them: 'You as grand jurors of this inquest, for the body of this county of .... do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge; your own counsel and the counsel of the people, and of your fellows, you shall keep secret; you shall present no person for envy, hatred or malice, neither shall you leave any person unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God.'

"**Sec. 19.** Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such jury is consistent with, or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon complaint against such person for perjury, or upon his trial for such offense; but in no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question.

"**Sec. 40.** All informations shall be filed during term in the court having jurisdiction of the offense specified therein, after the proper return is filed by the examining magistrate by the prosecuting attorney of the county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same. Names of other witnesses may be indorsed before or during the trial by leave of the court and upon such conditions as the court shall determine.

"**Sec. 42.** No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination: Provided, however, That informations may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed, may be demanded by the governor of this state of the executive authority of any other state or territory, or of any foreign government, in the same manner and the same proceeding may be had thereon as provided by law in like cases of demand upon indictment filed."

APPENDIX 'D'

Pertinent provision of 'Michigan Code of Criminal Procedure' in respect of reversible errors:

Act No. 175, Chap. IX, § 26, Pub. Acts 1927 [3 Comp. Laws 1929, § 17354 (Stat. Ann. § 28.1096)]:

Chapter IX

"**Sec. 26.** No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice".